No. MC-115495 (Sub-No. 37F), United Parcel Service, Inc., now being assigned for Prehearing Conference on January 17, 1979, at the Office of Interstate Commerce Commission, Washington, DC.

No. MC 143884 (Sub-No. 2), Personilized Agent Service, Inc., now assigned for hearing on January 29, 1979, at Atlanta, GA., and will be held in Conference Room 102E, Peachtree Seventh Bldg.

No. MC-144506F, Koller Petroleum Products, Inc., now assigned for hearing on January 10, 1979, at Madison Wisconsin, and will be held in C.I. Conference Room 125, North Walnut Street.

No. MC-107012 (Sub-No. 274F), North American Van Lines, Inc., now being assigned for hearing on February 7, 1979, at the Offices of the Interstate Commerce Commission, Washington, DC.

No. MC-78228 (Sub-No. 88F), J. Miller Express, Inc., now being assigned for hearing on February 8, 1979, at the Offices of the Interstate Commerce Commission, Washington, DC.

No. MC-118159 (Sub-No. 280F), National Refrigerated Transport, Inc., now being assigned for hearing on February 9, 1979, at the Offices of the Interstate Commerce Commission, Washington, DC.

H.G. HOME, Jr.,
Secretary.

[FR Doc. 79-488 Filed 1-4-79; 8:45 am]

[7035-01-M]

[Docket No. AB-36 (Sub-No. 9F)]

OREGON SHORT LINE RAILROAD CO.

Abandonment and Discontinuance of Service by Union Pacific Railroad Co. Near Rubicon and New Meadows in Adams County, ID; Notice of Findings

Notice is hereby given pursuant to Section 1a of the Interstate Commerce Act (49 U.S.C. 1a) that by a Certificate and Decision decided December 18, 1978, a finding, which is administratively final, was made by the Commission, Review Board Number 5, stating that, subject to the conditions for the protection of railway employees prescribed by the Commission in *Oregon Short Line R. Co.—Abandonment Goshen*, 354 I.C.C. 584 (1978), the present and future public convenience and necessity permit the physical abandonment by the Oregon Short Line Railroad Company and discontinuance of service by the Union Pacific Company over a portion of the New Meadows Branch extending from railroad milepost 84.52 near Rubicon, ID, to the end of the line at railroad milepost 89.91 at New Meadows, ID, a distance of 5.39 miles in Adams County, ID. A certificate of public convenience and necessity permitting abandonment and discontinuance of service was issued to the Oregon Short Line Railroad Company and the Union Pacific Railroad Company. Since no investigation was instituted, the requirement of Section 1121.38(a) of the Regulations that publication of notice of abandonment decisions in the FEDERAL REGISTER be made only after such a decision becomes administratively final was waived.

Upon receipt by the carrier of an actual offer of financial assistance, the carrier shall make available to the offeror the records, accounts, appraisals, working papers, and other documents used in preparing Exhibit I (§ 1121.45 of the Regulations). Such documents shall be made available during regular business hours at a time and place mutually agreeable to the parties.

The offer must be filed and served no later than 15 days after publication of this Notice. The offer, as filed, shall contain information required pursuant to Section 1121.38(b) (2) and (3) of the Regulations. If no such offer is received, the certificate of public convenience and necessity authorizing abandonment shall become effective February 20, 1979.

H. G. HOMME, Jr.,
Acting Secretary.

[FR Doc. 79-490 Filed 1-4-79; 8:45 am]

[7035-01-M]

SOUTHERN CRESCENT

Notice Regarding Possible Discontinuance of Operations by Southern Railway Co.

AGENCY: Interstate Commerce Commission.

ACTION: Notice to the Public.

SUMMARY: This notice seeks comments on whether and on what conditions, if any, the Commission should enter an order permitting Southern Railway Company to discontinue its operations of the "Southern Crescent" upon Amtrak's assuming responsibilities for continuing the service.

EFFECTIVE DATE: January 22, 1979.

FOR FURTHER INFORMATION CONTACT:

G. Marvin Bober, Acting Deputy Director, Section of Finance, I.C.C.—Room 5417, Washington, D.C. 20423, 202-275-7564.

SUPPLEMENTARY INFORMATION: Southern filed a petition seeking reopening and reconsideration of our earlier decision in Finance Docket No. 28697, *Southern Railway Company—Discontinuance of trains Nos. 1 and 2 the "Southern Crescent" Between Washington, D.C. and New Orleans, La.*, printed at 354 I.C.C. 630 (1978) which denied its application to discontinue operation of the above-described passenger trains. Petitioner states that on December 13, 1978, the Board of Directors of the National Railroad Passenger Corporation (Amtrak) approved an agreement with Southern for Amtrak to take over operation of the "Southern Crescent". The agreement provides for Amtrak to institute the service on February 1, 1979, or the day after Southern is authorized to discontinue the service, whichever is later.

All parties wishing to comment on whether and on what conditions, if any, the Commission should enter an order permitting Southern to discontinue its operation of the "Southern Crescent" should do so by January 22, 1979.

An original and 10 copies should be mailed to the Commission at the aforementioned address.

A copy should also be filed on Southern Railway Company, P.O. Box 1808, Washington, D.C. 20013, and its counsel, Frederick G. Berner, Jr., 1730 Pennsylvania Avenue NW., Washington, D.C. 20006, William Erkelenz, National Railroad Passenger Corp., 400 North Capitol Street NW., Washington, D.C. 20001, John Heffner, Suite 1212, 425 13th Street NW., Washington, D.C. 20004, John O'B. Clarke, Jr., Suite 210, 1050 17th Street NW., Washington, D.C. 20036, and all other parties of record.

H. G. HOMME, Jr.,
Secretary.

[FR Doc. 79-489 Filed 1-4-79; 8:45 am]

sunshine act meetings

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

CONTENTS

[6355-01-M]

1

CONSUMER PRODUCT SAFETY COMMISSION.

DATE AND TIME: January 10, 1979, 10 a.m.

LOCATION: Room 456 Westwood Towers Building, 5401 Westbard Ave., Bethesda, Maryland.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

AGENDA

Closed to the public

1. *Briefing on cellulose insulation (515c) enforcement.* The staff will brief the Commission on issues related to enforcement of the Cellulose Insulation (515c) Regulation.

2. *Briefing on TRIS.* The staff will discuss the status of enforcement activities related to TRIS-treated garments.

CONTACT PERSON FOR ADDITIONAL INFORMATION:

Sheldon D. Butts, Assistant Secretary, Office of the Secretary, Consumer Product Safety Commission, Suite 300, 1111 18th Street NW., Washington, D.C. 20207.

[S-16-79 Filed 1-3-79; 2:51 pm]

[6355-01-M]

2

CONSUMER PRODUCT SAFETY COMMISSION.

DATE AND TIME: January 11, 1979, 9:30 a.m.

LOCATION: Third floor hearing room, 1111 18th Street NW., Washington, D.C. 20207.

STATUS: Open.

MATTERS TO BE CONSIDERED:

AGENDA

Open to the public

1. *Recommendation to accept corrective action plan: Carrier Corp., air conditioner, ID 78-101.* The staff has recommended that the Commission accept and monitor the corrective action plan which Carrier has implemented to address a possible defect in certain 6,000 BTU size room air conditioners.

2. *Recommendation to accept corrective action plans: Market Research Imports (ID 78-36), LeGran Imports (ID 78-43), Beck Electric (ID 78-61), Hayashi International Corp. (ID 78-70)—Christmas light bulbs.* The staff has recommended that the Commission accept and monitor the corrective action plans which each of the subject companies have implemented to address a possible defect in certain imported Christmas light bulbs.

3. *Recommendation to accept corrective action plan: Bombardier Limited, Snowmobile, ID 78-84.* The staff recommended that the Commission accept and monitor the corrective action plan which Bombardier has implemented to address a possible substantial product defect in its 1978 Citation brand Ski-Doo snowmobiles.

4. *Special labeling concerning the cardiotoxicity of methylene chloride (Petition HP 76-8).* On January 5, 1978 the Commission voted to grant a petition (HP 76-8) from the Empire State Consumer Association requesting special labeling under the FHSA for paint stripers containing methylene chloride. Staff now raises the issue of whether the Commission should reconsider this decision in light of the lack of direct evidence of the alleged risk of injury.

5. *Petition HP 78-6 to amend fireworks regulation.* The Commission will consider a petition from the American Pyrotechnics Association to make seven amendments to the Commission's regulation on firework devices. The amendments concern fuse side ignition, chlorate fuse, side ignition of smoke devices, fuse burning time, base to height ratio, aerial items, and external flame on smoke devices.

CONTACT PERSON FOR ADDITIONAL INFORMATION:

Sheldon D. Butts, Assistant Secretary, Office of Secretary, Consumer Product Safety Commission, Suite 300, 1111 18th Street NW., Washington, D.C. 20207.

[S-17-79 Filed 1-3-79; 2:51 pm]

[6570-06-M]

3

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

TIME AND DATE: 9:30 a.m. (eastern time), Tuesday, January 9, 1979.

PLACE: Commission Conference Room, No. 5240, on the fifth floor of the Columbia Plaza Office Building, 2401 E Street NW., Washington, D.C. 20506.

STATUS: Part will be open to the public and part will be closed to the public.

MATTERS TO BE CONSIDERED:

Open to the public:

1. Technical amendments to Affirmative Action Guidelines.
2. Report on Commission operations by the Executive Director.

Closed to the public:

Litigation Authorization; General Counsel Recommendations: Matters closed to the public under the Commission's regulations at 29 CFR 1612.13.

NOTE.—Any matter not discussed or concluded may be carried over to a later meeting.

CONTACT PERSON FOR MORE INFORMATION:

Marie D. Wilson, Executive Officer, Executive Secretariat, at 202-634-6748.

This notice issued January 2, 1979.

[S-12-79 Filed 1-3-79; 11:33 am]

[6714-01-M]

4

FEDERAL DEPOSIT INSURANCE CORPORATION.

TIME AND DATE: 10 a.m. on Wednesday, January 10, 1979.

PLACE: Board Room, 6th floor, FDIC Building, 550 17th Street NW., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Disposition of minutes of previous meetings.
Recommendations with respect to payment for legal services rendered and expenses incurred in connection with receivership and liquidation activities:

Strasburger & Price, Dallas, Texas, in connection with the receivership of

United States National Bank, San Diego, California.

Casey, Lane & Mittendorf, New York, New York, in connection with the liquidation of Franklin National Bank, New York, New York.

Taback & Hyams, Jericho, New York, in connection with the liquidation of Franklin National Bank, New York, New York.

Meredith, Donnell & Edmonds, Corpus Christi, Texas, in connection with the liquidation of Northeast Bank of Houston, Houston, Texas.

Recommendations with respect to the amendment of Corporation rules and regulations:

Memorandum and resolution proposing the final adoption of amendments to Part 304 of the Corporation's rules and regulations, entitled "Forms, Instructions, and Reports," with respect to applications for insurance by "phantom" banks.

Acquisition of additional space for the Division of Bank Supervision Training Center.

Reports of committees and officers:

Minutes of the actions approved by the Committee on Liquidations, Loans and Purchases of Assets pursuant to authority delegated by the Board of Directors.

Report of the Executive Secretary regarding his transmittal of "no significant effect" competitive factor reports.

Reports of the Director of the Division of Bank Supervision with respect to applications or requests approved by him and the various Regional Directors pursuant to authority delegated by the Board of Directors.

Report of the Director of the Division of Liquidation detailing all disbursements in excess of $10,000 and all sales of real estate properties, during the period October 16, 1978-December 16, 1978, in connection with the liquidation of The Hamilton National Bank of Chattanooga, Chattanooga, Tennessee.

Reports of security transactions authorized by the Acting Chairman.

CONTACT PERSON FOR MORE INFORMATION:

Alan R. Miller, Executive Secretary, 202-389-4446.

[S-18-79 Filed 1-3-79; 2:51 pm]

[6714-01-M]

5

FEDERAL DEPOSIT INSURANCE CORPORATION.

TIME AND DATE: 10:30 a.m. on Wednesday, January 10, 1979.

PLACE: Board Room, 6th floor, FDIC Building, 550 17th Street NW., Washington, D.C.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Applications for Federal deposit insurance:

Maya Bank, a proposed new bank to be located on the southwest corner of the intersection of Palomar Street and Industrial Boulevard, Chula Vista, California, for Federal deposit insurance.

Landmark Bank, a proposed new bank to be located at 441 West Whittier Boulevard, La Habra, California, for Federal deposit insurance.

Bank of Palm Springs, a proposed new bank to be located at the intersection of Taquitz-MaCallum and Alverado Streets, Palm Springs, California, for Federal deposit insurance.

Citizens Fidelity Bank, a proposed new bank to be located at 1000 Volunteer Parkway, Bristol, Tennessee, for Federal deposit insurance.

Equitable Bank, a proposed new bank to be located at the intersection of Preston Road and Campbell Road, Dallas, Texas, for Federal deposit insurance.

Mercantile Bank of Fort Worth, a proposed new bank to be located at 2550 Mecham Boulevard, Fort Worth, Texas, for Federal deposit insurance.

Wasatch Bank of Lehi, a proposed new bank to be located at 620 East Main Street, Lehi, Utah, for Federal deposit insurance.

Application for consent to establish a branch:

The Greater New York Savings Bank, New York, New York, for consent to establish a branch at 1330-1332 First Avenue, New York, New York.

Request pursuant to section 19 of the Federal Deposit Insurance Act for consent to service of a person convicted of an offense involving dishonesty or a breach of trust as a director, officer, or employee of an insured bank:

Name of person and of bank authorized to be exempt from disclosure pursuant to the provisions of subsection (c)(6) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(6)).

Recommendations regarding the liquidation of a bank's assets acquired by the Corporation in its capacity as receiver, liquidator, or liquidating agent of those assets:

Case No. 43,726-SR—Sharpstown State Bank, Houston, Texas.

Case No. 43,745-L—International City Bank & Trust Company, New Orleans, Louisiana

Case No. 43,747-L—Northeast Bank of Houston, Houston, Texas.

Case No. 43,750-L—Interntional City Bank & Trust Company, New Orleans, Louisiana.

Case No. 43,756-L—Franklin National Bank, New York, New York.

Case No. 43,757-L—Banco Credito y Adhorro Ponceno, Ponce, Puerto Rico.

Case No. 43,759-L—Franklin National Bank, New York, New York.

Case No. 43,760-L—American City Bank & Trust Company, National Association, Milwaukee, Wisconsin.

Case No. 43,761-L—American Bank & Trust, Orangeburg, South Carolina.

Case No. 43,762-SR—Citizens State Bank, Carrizo Springs, Texas.

Case No. 43,764-L—The Hamilton Bank & Trust Company, Atlanta, Georgia.

Case No. 43,769-L—Wilcox County Bank, Camden, Alabama.

Memorandum re: American Bank & Trust Company, New York, New York.

Recommendations with respect to the initiation or termination of cease-and-desist proceedings, termination-of-insurance proceedings, or suspension or removal proceedings against certain insured banks or officers or directors thereof:

Names of persons and names and locations of banks authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(6), (c)(8), and (c)(9)(A)(ii) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(6), (c)(8), and (c)(9)(A)(ii)).

Personnel actions regarding appointments, promotions, administrative pay increases, reassignments, retirements, separations, removals, etc.:

Names of employees authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(2) and (c)(6) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2) and (c)(6)).

Grievance Officers' reports and recommendations with respect to the formal grievances of Corporation employees.

CONTACT PERSON FOR MORE INFORMATION:

Alan R. Miller, Executive Secretary, 202-389-4446.

[S-19-79 Filed 1-3-79; 2:51 pm]

[6715-01-M]

6

FEDERAL ELECTION COMMISSION.

DATE AND TIME: Wednesday, January 10, 1979 at 10 a.m.

PLACE: 1325 K Street NW., Washington, D.C.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Audits and Audit Policy. Compliance. Personnel.

DATE AND TIME: Thursday, January 11, 1979 at 10 a.m.

STATUS: Portions of this meeting will be open to the public and portions will be closed.

MATTERS TO BE CONSIDERED:

Portions open to the public:

Setting of dates for future meetings.
Correction and approval of minutes.
Advisory Opinions: AO 1978-89, AO 1978-97, AO 1978-98, AO 1978-99, and AO 1978-100.
Draft regulations for Presidential primary matching fund, TITLE 11, Code of Federal Regulations, Subchapter C.
Budget Execution Report.
Appropriations and budget.
Pending litigation.
Liaison with other Federal agencies.
Classification actions.
Routine administrative matters.

Portions of the meeting closed to the public:

Any matters not concluded on January 10, 1979.

PERSONS TO CONTACT FOR INFORMATION:

Mr. Fred S. Eiland, Public Information Officer, telephone 202-523-4065.

LENA L. STAFFORD,
Acting Secretary
to the Commission.

[S-20-79 Filed 1-3-79; 3:34 pm]

[6730-01-M]

7

FEDERAL MARITIME COMMISSION.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: December 29, 1978; 43 FR 61083.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 10 a.m., January 4, 1979.

CHANGES IN THE MEETING: Addition of the following items to the closed session:

3. Internal procedures for drafting and approving Commission reports and orders.
4. Letter of Sea-Land Service, Inc., dated December 28, 1978, concerning settlement agreement.

[S-13-79 Filed 1-3-79; 11:41 am]

[6730-01-M]

8

FEDERAL MARITIME COMMISSION.

TIME AND DATE: 10 a.m., January 11, 1979.

PLACE: Room 12126, 1100 L Street NW., Washington, D.C. 20573.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Agreement No. 10285: Rate agreement between the Straits/New York Conference and four mini-landbridge carriers—Request for hearing.
2. (1) Proposed SS *United States* Escrow Agreement and (2) Proposed "Mariners Club Letter" and "Mariner Questionnaire" of United States Cruises, Inc.

CONTACT PERSON FOR MORE INFORMATION:

Francis C. Hurney, Secretary, 202-523-5725.

[S-14-79 Filed 1-3-79; 11:41 am]

[6735-01-M]

9

JANUARY 2, 1979.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION.

TIME AND DATE: 10 a.m., January 9, 1979.

PLACE: Room 600, 1730 K Street NW., Washington, D.C. 20006.

STATUS: This meeting will be open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following proceedings:

1. Staff briefing on issue of independent reviewability of citations.
2. *Peabody Coal Co.*, Docket No. BARB 77-245-P (civil penalty proceeding).

CONTACT PERSON FOR MORE INFORMATION:

Donald Terry, 202-653-5644.

[S-6-79 Filed 1-3-79; 11:33 am]

[6735-01-M]

10

JANUARY 2, 1979.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION.

TIME AND DATE: 10 a.m., January 4, 1979.

PLACE: Room 600, 1730 K Street NW., Washington, D.C. 20006.

STATUS: This meeting will be open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following agenda item:

1. *MSHA* v. *Kenny Richardson*, Docket No. BARB 78-600-P. It was determined by unanimous vote of all Commissioners that Commission business required that a meeting be held on this item and that no earlier announcement of the meeting was possible.

CONTACT PERSON FOR MORE INFORMATION:

Donald Terry, 202-653-5644.

[S-15-79 Filed 1-3-79; 2:51 pm]

[6210-01-M]

11

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM.

TIME AND DATE: 10 a.m., Wednesday, January 10, 1979.

PLACE: 20th Street and Constitution Avenue NW., Washington, D.C. 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Proposed Statement of Customers' Rights to implement a section of Title XI of the Financial Institutions Regulatory and Interest Rate Control Act.
2. Proposal to implement Executive Order 12044, relating to Improving Government Regulations.
3. Board's regulatory improvement program: review of Regulation S (Bank Service Arrangements).
4. Proposed report to the Congress on remote disbursement practices of commercial banks and a related proposed public statement.
5. Any agenda items carried forward from a previously announced meeting.

NOTE.—This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling 202-452-3684 or by writing to: Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, D.C. 20551.

CONTACT PERSON FOR MORE INFORMATION:

Mr. Joseph R. Coyne, Assistant to the Board, 202-452-3204.

THEODORE E. ALLISON.

JANUARY 3, 1979.

[S-11-79 Filed 1-3-79; 11:33 am]

[7020-02-M]

12

[USITC SE-79-1]

UNITED STATES INTERNATIONAL TRADE COMMISSION.

TIME AND DATE: 10 a.m., Thursday, January 11, 1979.

PLACE: Room 117, 701 E Street NW., Washington, D.C. 20436.

STATUS: Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED:

Portions open to the public:

1. Agenda.
2. Minutes.
3. Ratifications.
4. Petitions and complaints (if necessary): a. Finished precision resistors (Docket No. 550). b. Bicycle tires and tubes from the Republic of Korea (Docket No. 551).
5. Centrifugal trash pumps (Inv. 337-TA-43)—Vote.
6. Tantalum electrolytic fixed capacitors from Japan (Inv. AA1921-159)—Consideration of staff memorandum GC-H-366.
8. Any items left over from previous agenda.
9. Consideration of the report in Investigation 332-87 (U.S. Western Steel Market).

Portions closed to the public:

7. Status report on Investigation 332-101 (MTN Study), if necessary.

CONTACT PERSON FOR MORE INFORMATION:

Kenneth R. Mason, Secretary, 202-523-0161.

[S-21-79 Filed 1-3-79; 3:57 pm]

[7555-01-M]

13

NATIONAL SCIENCE BOARD.

DATE AND TIME: January 18, 1979, 1 p.m., open session. January 19, 1979, 9 a.m., closed session.

PLACE: Room 540, 1800 G Street NW., Washington, D.C.

STATUS: Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED AT THE OPEN SESSION:

1. Program Review—Science Education.
2. Minutes—Open Session—202nd Meeting.
3. Chairman's Report.
4. Director's Report:
a. Report on Grant & Contract Activity—11/16/78–1/17/79.
b. Organizational and Staff Changes.
c. Congressional and Legislative Matters (including Antarctic Conservation Act of 1978).
d. NSF Budget for Fiscal Years 1979 and 1980.
e. Regional Instrumentation Facility Program.
f. Advisory Council Task Groups.
5. Board Committees—Reports on Meetings:
a. Executive Committee.
b. Planning and Policy Committee.
c. Programs Committee.
d. Committee on Budget.
e. Committee on Eleventh NSB Report.
f. Committee on Minorities and Women in Science.
g. Committee on Role of NSF in Basic Research.
h. Committee on Science and Society.
i. Ad Hoc Committee on Deep Sea and Ocean Margin Drilling Programs.
6. NSF Advisory Groups and Annual Review:
a. Reports on Meetings.
b. Board Representation at Future Events.
7. Grants, Contracts, and Programs.
8. Proposed Changes in "Criteria" Document—Guidelines for Selection of Projects.
9. Proposed Materials Science Study.
10. Other Business.
11. Next Meetings:
a. National Science Board—February 15-16, 1979.
b. NSB Committees.
c. Program Review.

MATTERS TO BE CONSIDERED AT THE CLOSED SESSION:

A. Minutes—Closed Session—202nd Meeting.
B. Grants, Contracts, and Programs.
C. NSF Budgets for Fiscal Year 1980 and Subsequent Years.
D. NSB Annual Reports.
E. Report on NSB Nominees.
F. Appointment of members to Alan T. Waterman Award Committee.

CONTACT PERSON FOR MORE INFORMATION:

Miss Vernice Anderson, Executive Secretary, 202-632-5840.

[S-8-79 Filed 1-3-79; 11:33 am]

[7600-01-M]

14

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION.

TIME AND DATE: 1 p.m., January 11, 1979.

PLACE: Room 1101, 1825 K Street NW., Washington, D.C.

STATUS: Because of the subject matter, it is likely that this meeting will be closed.

MATTERS TO BE CONSIDERED: Discussion of specific cases in the Commission adjudicative process.

CONTACT PERSON FOR MORE INFORMATION:

Ms. Patricia Bausell, 202-634-4015.

Dated: January 2, 1979.

[S-7-79 Filed 1-3-79; 11:33 am]

[7910-01-M]

15

THE RENEGOTIATION BOARD.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 43 FR 61084, December 29, 1978.

PREVIOUSLY ANNOUNCED DATE AND TIME OF MEETING: Wednesday, January 3, 1979.

CHANGE IN MEETING: Meeting is cancelled.

CONTACT PERSON FOR MORE INFORMATION:

Kelvin H. Dickinson, Assistant General Counsel-Secretary, 2000 M Street NW., Washington, D.C. 20446, 202-254-8277.

Dated: January 2, 1979.

HARRY R. VAN CLEVE,
Acting Chairman.

[S-9-79 Filed 1-3-79; 11:33 am]

[7910-01-M]

16

THE RENEGOTIATION BOARD.

DATE AND TIME: Tuesday, January 9, 1979; 10 a.m.

PLACE: Conference Room, 4th floor, 2000 M Street NW., Washington, D.C. 20446.

STATUS: Matters 1 and 2 are open to public observation. Matter 3 is closed to public observations. Matter 4 and 5 are not applicable for status.

MATTERS TO BE CONSIDERED:

1. Approval of minutes of meeting held December 19, 1979; and other Board meetings, if any.

2. Report on partial year filings and applications for commercial exemption.

3. Proposed Opinion: Stelma Inc., successor-in-interest to a 1960 Delaware Corporation of the same name, fiscal years ended March 31, 1968 and 1969 and May 8, 1969.

4. Approval of agenda for meeting to be held January 23, 1979.

5. Approval of agenda for other meetings, if any.

CONTACT PERSON FOR MORE INFORMATION:

Kelvin H. Dickinson, Assistant General Counsel-Secretary, 2000 M Street NW., Washington, D.C. 20446, 202-254-8277.

Dated: January 2, 1979.

HARRY R. VAN CLEVE,
Acting Chairman.

[S-10-79 Filed 1-3-79; 11:33 am]

FRIDAY, JANUARY 5, 1979
PART II

federal register

DEPARTMENT OF LABOR

Mine Safety and Health Administration

■

MINE RESCUE TEAMS

[4510-43-M]

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[30 CFR Part 49]

MINE RESCUE TEAMS

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Proposed rule.

SUMMARY: The Federal Mine Safety and Health Act of 1977 (Act), Section 115(e), requires the Secretary of Labor to publish proposed regulations which provide that mine rescue teams shall be available for rescue and recovery work to each underground coal or other mine in the event of an emergency. The Act provides that the costs of making advance arrangements for such teams shall be borne by the operator. The proposed rule requires the operator of each underground mine to have available at least two mine rescue teams and establishes the requirements for such teams. Interested persons may participate by submitting written comments, suggestions and objections to the address provided below.

DATES: Comments must be received on or before March 5, 1979.

ADDRESSES: Send comments to the Department of Labor, Mine Safety and Health Administration, Office of Standards, Regulations and Variances, Room 631, Ballston Tower No. 3, 4015 Wilson Boulevard, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT:

Frank A. White, (703) 235-1910.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Mine Safety and Health Amendments Act of 1977, Pub. L. 95-164, amended the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), Pub. L. 91-173, and repealed the Metal and Nonmetallic Mine Safety Act, Pub. L. 89-577. The Federal Mine Safety and Health Act of 1977 (Act), Pub. L. 91-173 as amended by Pub. L. 95-164, applies to coal, metal and nonmetal mines.

Section 115(e) of the Act provides: "Within 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977, the Secretary shall publish proposed regulations which shall provide that mine rescue teams shall be available for rescue and recovery work to each underground coal or other mine in the event of an emergency. The costs of making advance arrangements for such teams shall be borne by the operator of each such mine."

In accordance with Executive Order 12044 concerning improvement of government regulations and Department of Labor proposed guidelines implementing the Executive Order (43 FR 22915), persons known to be interested were contacted and given an opportunity to submit informal comments on a draft of the proposed rule prior to its publication in the Federal Register. The comments received have been given full consideration. As a whole, the comments reflect a desire for flexibility in the proposed rule particularly with respect to the equipment and training requirements, and several of the comments raised questions which merit further consideration. The most significant comments received are referred to in the following discussion of the proposed rule, together with considerations which prompted the proposed requirements. However, pending the benefit of full public comment, no changes in the basic approach of the MSHA draft have been made in the proposed rule.

II. Discussion of Proposed Rule

Under the proposed rule, each operator of an underground mine would be required to have available for each mine at least two mine rescue teams composed of five members and two alternates, unless an alternate mine rescue plan is approved by the Mine Safety and Health Administration (MSHA) District Manager.

One of the informal comments submitted suggested that one rescue team for each mine would be sufficient while another commenter considered three rescue teams appropriate in some circumstances. The proposed rule has retained the requirement that each operator establish or secure the services of at least two mine rescue teams so that a backup rescue team will be available in the event additional rescue assistance is needed. For instance, under severe mine rescue conditions or in the event prolonged rescue and recovery operations are required, alternating mine rescue teams would be necessary. The immediate services of two mine rescue teams would also be needed in the event of a major mine disaster. The proposed requirement also recognizes that a mine rescue team may already be involved in rescue operations or other activities which would jeopardize timely response by the team. This risk is significantly reduced by the proposed requirement of two mine rescue teams. However, at this point in the rulemaking process, MSHA is not convinced, based upon its experience, that it is necessary to require the availability of three mine rescue teams at any mine.

Notwithstanding the increased effectiveness and reliability of mine rescue capability provided by the proposed two team requirement, MSHA recognizes that under some circumstances meeting the two team requirement would be impracticable. One of the comments received provided an example, indicating that within a 60 minute area around the mine there was not a sufficient number of qualified persons to establish two mine rescue teams. Under these and similar circumstances, the proposed rule would require that the operator submit a detailed alternate mine rescue plan to the District Manager for approval. As part of such alternate plan for ensuring mine rescue capability it would be necessary for the operator to state the reasons why mine rescue teams could not be made available in accordance with the proposed rule, together with the number of miners employed at the mine, the distance from the mine of established mine rescue teams and stations and the availability of State mine rescue teams.

Under the proposed rule, an alternative plan may only be considered if "the mine is small and in a remote location." Several comments suggested that the criteria should be expanded to include other conditions or situations which might merit the use of an alternative to the mine rescue team requirements of these proposed rules. MSHA will be considering the appropriateness of this suggestion during the rulemaking process and encourages comments in this regard.

To make mine rescue teams available to each underground mine, the proposed rule would require each operator to establish and equip its own rescue teams or to enter into a written contractual or cooperative agreement which ensures the availability of mine rescue teams, unless an alternate mine rescue plan is approved by the District Manager. In any event, each operator would be required to give the MSHA District Manager in the district where the mine is located written notice of how the operator is securing availability of mine rescue teams. Where applicable, the operator would be required to submit a copy of any contractual or cooperative agreement for the services of a mine rescue team.

Several comments received emphasized the tradition and importance of voluntary mine rescue and recovery work and questioned whether rescue team members could be required to respond to an emergency. Under the proposed rule, an operator electing to have mine rescue teams available by written contractual or cooperative agreement is required only to enter into a contract or cooperative agreement for the availability of such teams. The proposed rule would not bind mine rescue team members or alternates to respond. However, it is expected that if the lives of miners or

other persons were threatened, any mine rescue team available would respond without hesitation.

Proposed § 49.3 prescribes minimum equipment requirements for mine rescue teams. These equipment requirements are based on MSHA's experience in mine safety and rescue and include equipment commonly used by established mine rescue teams. MSHA considers the proposed requirements to be the minimum rescue equipment necessary for effective mine rescue teams. The proposed equipment requirements for each mine rescue team are breathing apparatus, permissible cap lamps, self rescuers, a portable stretcher and blanket, a first aid kit and a tool bag. The proposed rule would also establish minimum equipment requirements for mine rescue stations. The proposed rule would require mine rescue stations to be equipped with one oxygen pump, suitable for use with the type of breathing apparatus used by the rescue teams; a portable supply of air, oxygen or chemicals, as applicable to the breathing apparatus used; a supply of spare parts for such breathing apparatus; a portable communication system and one self-contained oxygen resuscitator. Each rescue station would also be required to be equipped with two gas detectors for each of five potentially hazardous gases identified in the regulation. This proposed requirement would be satisfied by two individual detectors for each of the five gases or two multifunction detectors able to detect each of the five gases. In addition, it is proposed that rescue stations be equipped with one methane detector able to measure methane in any concentration up to 100 percent and two oxygen indicators or flame safety lamps. The proposed rule would also require that readily available conventional ground transportation be maintained for mine rescue teams. The proposed rule would not preclude the use of other faster means of transportation when responding to an emergency, however, the required ground transportation must be maintained available.

The proposed mine rescue team equipment requirements are slightly changed from the draft of the proposed rule. No changes in the equipment proposed have been made. However, the comments received indicated that unnecessary duplication of equipment could result.

For the proposed rule to effectively ensure availability of mine rescue teams to all underground mines, it is necessary that each mine rescue team be independently able to respond to a mine emergency. To accomplish this purpose, it is proposed that each rescue team be provided its own breathing apparatus, cap lamps and other equipment essential to independent effective mine rescue and recovery work. However, the ability to independently respond to an emergency is not contingent upon each mine rescue team being provided, for example, its own oxygen pump, or spare breathing apparatus parts or other equipment and accessories which reasonably may be shared between two rescue teams at a single mine rescue station. Accordingly, under the proposed rule each mine rescue team would be provided certain essential rescue equipment, while other equipment and accessories would be required to be available to rescue teams at the mine rescue station. Equipment and accessories shared between rescue teams must also be made available to both teams for training.

Commenters also asked whether mine rescue teams could be maintained and trained by the operator in accordance with the draft proposal, but equipment for such teams be provided by contractual arrangement with a mine rescue station. The proposed rule is intended to be sufficiently flexible to meet varying needs and would not prohibit such a method of providing rescue teams with the necessary equipment, so long as the availability of the rescue teams would not be hindered. Another comment addressing rescue team equipment questioned whether the proposed rule made allowance for use of improved and new equipment. The proposed rule only establishes the minimum equipment to be provided rescue teams. Improved equipment and alternate new equipment is anticipated and accounted for in the proposed rule.

The proposed rule would also govern the maintenance of mine rescue equipment. Proposed § 49.4 would require inspection and testing of breathing apparatus at intervals not exceeding 30 days by a person trained in the use and care of the breathing apparatus in accordance with manufacturer's recommendations to ensure reliability. A record of such inspections would be required to be maintained at the mine rescue station for a period of two years.

Under the proposed rule, mine rescue team members and alternates would be required to meet minimum experience, physical and training requirements. MSHA considers the proposed requirements to be essential for the protection of mine rescue team members, alternates and miners during rescue and recovery work.

To be eligible to serve on a mine rescue team, a total of one year or more underground mining experience within the preceding three years would be required. Miners stationed on the surface, but whose duties have required regular underground work would be considered employed in an underground mine.

The proposed physical requirements would be met by each team member and alternate annually passing a physical examination and obtaining the examining physician's certification that the member or alternate is in excellent physical condition and fit to perform mine rescue and recovery work for extended periods under strenuous conditions, including use of a self-contained oxygen breathing mine rescue apparatus. It is proposed that MSHA provide a physician's examination form to be completed by the examining physician and that a record of such completed form be maintained for at least two years at the mine rescue station.

The proposed physician's examination form would require the examining physician to conduct a careful review of medical history, rigorous physical examination and prescribed laboratory tests. The proposed laboratory test requirements would include a complete blood count, urinalysis, EKG and spirometry which provides forced vital capacity, 1 second forced expiratory volume and the maximum voluntary ventilation.

The proposed rule also identifies certain physical conditions which would disqualify a candidate from mine rescue team service. The conditions identified are those which could make mine rescue and recovery work unduly dangerous for the individual to undertake and could expose others to added risk under emergency conditions.

The proposed minumum standards for visual acuity and hearing would each be required to be met without the assistance of glasses or contact lenses, or a hearing aid. In addition, MSHA is considering whether the use of these devices by rescue team members and alternates presents potential hazards and should therefore be prohibited during rescue and recovery operations.

At this time, MSHA believes that wearing glasses together with approved breathing apparatus does not present a hazard. However, there is evidence that contact lenses may become lodged above the eye due to pressure in the facepiece of approved breathing apparatus. This could be harmful to the wearer and also pose a hazard to other persons under emergency conditions. Hearing aids may also present potential hazards. Hearing aids are battery operated and may therefore be dangerous in certain atmospheres. A hearing aid may also be dislodged under emergency conditions, creating hazards for the wearer and others. MSHA is soliciting comments concerning potential hazards with the use of glasses, contact lenses and hear-

ing aids by rescue team members and alternates.

Prior to serving on a mine rescue team, each rescue team member and alternate would also be required by the proposed rule to complete several courses of training approved by the Office of Education and Training, MSHA. The proposed training requirements include a 20-hour initial course of instruction in the use, care and maintenance of the type of breathing apparatus to be used by the rescue team. If auxiliary breathing equipment is provided, an additional 10-hour course of instruction in the use, care and capabilities of the auxiliary equipment would be required. If the type of breathing apparatus is changed, an additional four hours of training with the different breathing apparatus would be required. Upon completion of initial training, each team member and alternate would be required to complete a 20-hour course of instruction in advanced mine rescue procedures. It is also proposed that each team member and alternate receive basic training approved by the Office of Education and Training, MSHA, in first aid and cardiopulmonary resuscitation, complemented by approved annual refresher courses. In addition, each team member and alternate would be required to be trained and completely familiar with the ventilation, escape routes and refuge chambers of each mine served by the rescue team.

Commenters raised questions concerning the amount and type of instruction required under the proposed rule. The proposed requirements reflect the importance of complete knowledge of mine rescue equipment and procedures under emergency conditions. In view of the hazardous and diverse nature of mine rescue and recovery work, no changes in the amount of instruction have been made in the proposed rule. Although it may be possible to permit a more flexible approach, the comments on the draft proposal do not provide a sufficient basis for making a change in the proposed rule and additional comments and data are solicited.

Commenters also questioned the need for training in cardiopulmonary resuscitation (CPR). Basic knowledge of CPR together with training in first aid are required under the proposed rule so that mine rescue team members and alternates are prepared to respond to the unforeseeable as well as foreseeable circumstances which may arise under emergency mine rescue conditions. Although CPR techniques must be administered quickly after the need arises, and under some circumstances may even be dangerous to administer, MSHA believes it would be a distinct advantage if mine rescue team members had the ability to render this life-saving assistance.

Together with training through courses of instruction, the proposed rule would require rescue team members and alternates to receive practical training with the rescue equipment to be used by the team at least four hours each month or eight hours bimonthly. All team members and alternates would be required to annually complete at least 40 hours of such training to remain eligible to serve on the rescue team. Under the proposed rule, the required training sessions would include wearing and use of the breathing apparatus provided the rescue team for at least two hours bimonthly while under oxygen and training in the use of auxiliary equipment, if provided. The required practical training sessions would be held underground at least once each four months and the location of such sessions rotated among the mines served by the team.

Several commenters suggested that fewer practical training sessions by mine rescue teams would be adequate. The proposed monthly or bimonthly training session requirement is based on MSHA's experience in mine rescue and recovery work and reflect MSHA's experience that failure of mine rescue teams in the past most often has been due to insufficient training with rescue equipment and in rescue and recovery procedures. Accordingly, monthly or bimonthly training sessions are retained as a proposed requirement of mine rescue teams.

The proposed rule would also require MSHA approval of instructors to teach the proposed training course requirements to ensure uniform competency and procedures in mine rescue and recovery operations. Instructors would be approved by the MSHA Office of Education and Training. The proposed rule does not contain experience requirements for instructors, however MSHA is soliciting comments regarding whether previous mining or mine rescue experience should be part of instructor approval. An instructor's approval could be revoked by the MSHA Training Center Chief for good cause, which under the proposed rule may include not teaching a training course at least once every 24 months. The proposed rule would provide appeal procedures for approval revocation.

Under the proposed rule, the person in charge of each mine rescue team would be required to notify the Training Center Chief in the area where the mine rescue station is located of the training sessions scheduled, including the location, times and length of each session. In addition, a record of all practical training sessions and training courses completed by each team member and alternate would be required to be maintained at the mine rescue station for a period of two years.

The proposed rule would also establish basic requirements for mine rescue stations. It is proposed that mine rescue stations be adequate in size to conduct classes, unless other classrooms are readily available, and that the stations be provided with hot and cold running water, illumination, heat and a commercial telephone. It is also proposed that mine rescue stations be located no greater than 60 minutes travel time by conventional ground transportation from the mine or mines served. Greater distances, however, may be approved by the District Manager where mines are remotely located.

To ensure prompt response by mine rescue teams in the event of an emergency, the proposed rule would also require each mine to have a mine rescue notification plan. Such notification plan would be on a form supplied by MSHA and would outline procedures to be followed in notifying the mine rescue team when their services were required. It is proposed that a copy of the mine rescue notification plan and, where applicable, a copy of the written cooperative or contractual agreement for rescue team services be posted at the mine rescue station and the office of the mine served by the rescue team.

The proposed rule would also require a mine map of each mine served by a rescue team be posted at the mine rescue station. This proposed requirement is intended to assist mine rescue teams in being familiar with the ventilation, escape routes and refuge chambers of mines served. To adequately serve this purpose without imposing undue burden upon the operator, it is proposed that mine maps provided to mine rescue stations be updated no less than every six months, or whenever significant changes are made affecting ventilation, escape routes or refuge chambers.

Under the proposed rule each operator would also be required to provide representatives of miners information concerning mine rescue teams. MSHA believes the operator's method of ensuring availability of mine rescue teams is of great interest and concern to miners. In addition, the proposed requirement is responsive to Congress' clear intention to engender greater miner involvement in achieving purposes of the Act.

In addition to comments concerning specific proposed requirements, one commenter raised the issue of whether independent construction contractors would be required to comply with the proposed rule. This question arises from the definition of "operator" in

Section 3(d) of the Act. The Act defines the operator of a mine as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

The effectiveness of the proposed rule is premised upon continuous availability of mine rescue team services to each underground coal or other mine. To achieve the necessary continuity in availability of mine rescue teams, the "operator" who is an owner, lessee, or other person who operates, controls, or supervises a coal or other mine would be held responsible for compliance with the proposed rule. An "operator" meeting this definition is in the best position to provide and maintain continuously available mine rescue capability. If independent contractors were required to provide for availability of mine rescue teams while performing contruction or services at a mine, it would be necessary to shift responsibility for maintaining the availability of rescue teams. After an independent contractor completed its work at a mine site, responsibility for maintaining availability of mine rescue teams would have to shift to the operator who is the owner, lessee, or other person who operates, controls or supervises the mine. Such shifting of responsibility would unnecessarily jeopardize continuous mine rescue capability. Therefore, compliance with the proposed rule would be the responsibility of the "operator" who is an owner, lessee, or other person who operates, controls or supervises a coal or other mine.

III. Executive Order 12044

After review of available information, it has been determined that this document does not contain a major proposal requiring the preparation of a regulatory analysis under Executive Order 12044 and the Department of Labor's proposed guidelines for implementing the Executive Order (43 FR 22915, May 26, 1978). Based upon a projected need for approximately 800 new mine rescue teams and 350 new mine rescue stations in the coal mining industry and 90 new teams and 50 new stations in the metal and nonmetal mining industries, at a cost of approximately 33 thousand dollars per team and 39 thousand dollars per station, the total first year cost of this proposed rule would be approximately 45 million dollars.

Drafting Information

The principal persons responsible for preparation of this proposed rule are: John S. Curtis, Education and Training, Mine Safety and Health Administration and Edward C. Hugler, Attorney Advisor, Division of Mine Safety and Health, Office of the Solicitor, Department of Labor.

Dated: December 27, 1978.

Robert B. Lagather,
Assistant Secretary for Mine Safety and Health.

1. It is proposed to add a new part 49 to Subchapter H, Chapter I, Title 30, Code of Federal Regulations as set forth below:

PART 49—MINE RESCUE TEAMS

Sec.

Authority: The provisions of this Part 49 are issued pursuant to Sections 101, 103(h), 115(e) and 508 of the Federal Mine Safety and Health Act of 1977 (Pub. L. 91-173, as amended by Pub. L. 95-164).

§ 49.1 Scope and purpose.

This Part 49 implements the requirements of Section 115(e) of the Federal Mine Safety and Health Act of 1977 under which each operator of an underground coal or other mine shall provide for mine rescue teams to be available for rescue and recovery work at each such mine in the event of an emergency. This Part 49 applies to each operator of an underground coal or other mine.

§ 49.2 Availability of mine rescue teams.

(a) Within 6 months after the effective date, or prior to the opening of a new mine thereafter, the operator of each underground mine shall have at least two mine rescue teams available for rescue and recovery work. Except as provided in paragraph (b)(3) of this section, each mine rescue team shall consist of at least five members and two alternates, who shall be trained and qualified in accordance with the provisions of §§ 49.5, 49.6, and 49.7 of this part, and equipped in accordance with the provisions of § 49.3 of this part.

(b) The operator of an underground mine shall provide for the availability of mine rescue teams by:

(1) Establishing and equipping mine rescue teams which are available at all times when miners are underground; or

(2) Entering into a written contractual or cooperative agreement which insures the availability of mine rescue teams at all times when miners are underground; or

(3) Establishing an alternate mine rescue plan approved by the District Manager, if the mine is small and in a remote location. Such alternate plan shall be submitted to the District Manager in the district where the mine is located and state:

(i) The number of miners employed at the mine,

(ii) The distances from an established mine rescue team and station,

(iii) The availability of State mine rescue teams and stations,

(iv) The reasons why rescue teams which fully meet the requirements of paragraph (a) of this section cannot be made available,

(v) The operator's alternate method for enduring that mine rescue capability is provided at all times when miners are underground.

(c) The District Manager for the district where the mine is located shall be notified in writing by the operator as to how the requirements of paragraph (a) of this section will be met. The operator shall also provide the District Manager a copy of any contractual or cooperative agreement for the services of mine rescue teams.

§ 49.3 Equipment for mine rescue teams and stations.

(a) Each mine rescue team shall be provided with at least the following apparatus, equipment, and accessories which shall be stored in a mine rescue station:

(1) At least six self-contained oxygen breathing apparatus with a minimum of 2 hours capacity each, approved under Subpart H of Part 11 of this title, and the necessary equipment for testing such breathing apparatus;

(2) One extra oxygen bottle for each self-contained compressed oxygen breathing apparatus;

(3) Seven approved self-rescuers available for team members;

(4) Seven permissible cap lamps and charging rack;

(5) One portable stretcher;

(6) One blanket;

(7) One emergency first aid kit; and

(8) One tool bag containing:

(i) one brass hammer and brass nails if the rescue team is intended to render service to mines with explosive or potentially explosive atmospheres, or

(ii) one hammer and nails for nonexplosive atmospheres, and

(iii) accessories necessary for taking notes and marking locations underground.

(b) Each mine rescue station shall be equipped with at least the following apparatus, equipment and accessories:

(1) Two gas detectors for:

(i) Methane (CH_4) in concentrations of 0-5 percent or 0-10 percent,
(ii) Hydrogen sulfide (H_2S),
(iii) Carbon monoxide (CO),
(iv) Carbon dioxide (CO_2), and
(v) Oxides of nitrogen (NO);
(2) One methane (CH_4) detector—100 percent;
(3) Two oxygen indicators or two flame safety lamps;
(4) One oxygen pump, suitable to the type of breathing apparatus used by the rescue teams;
(5) A portable supply of liquid air, liquid oxygen, pressurized oxygen, or chemicals, as applicable to the breathing apparatus used by the mine rescue team(s), sufficient to sustain each team for 6 hours while using the breathing apparatus during rescue operations;
(6) A supply of spare parts for repairing the breathing apparatus used by the rescue team(s);
(7) One portable mine rescue communications systems, approved under Part 23 of this title, with spare parts, or a sound-powered communication system, with spare parts. The wires or cable to the communication system shall be of sufficient tensile strength so that the wires or cable may be used as a manual communication system. These communication systems shall be at least 1,000 feet in length;
(8) One self-contained oxygen resuscitator.
(c) Each operator shall establish, in advance, transportation for rescue teams and equipment by conventional ground transportation from the rescue station to the mine or mines serviced. Faster means of transportation may be used in the event of an emergency.

§ 49.4 Maintenance of mine rescue apparatus and equipment.

Mine rescue apparatus and equipment shall be stored and maintained in a manner that will insure readiness for immediate use. Breathing apparatus shall be inspected and tested, and where applicable, cylinder pressure maintained, by a person trained in the use and care of breathing apparatus in accordance with manufacturer's recommendations at intervals not exceeding 30 days. A record of inspections and tests, initialed by the person making the inspections and tests, shall be maintained at the mine rescue station for a period of two years.

§ 49.5 Physical requirements for team members and alternates.

(a) Each member of a mine rescue team and alternates shall annually be examined by a physician who shall certify that each member and alternate is physically fit to perform mine rescue and recovery work for prolonged periods under strenuous conditions, including use of a self-contained oxygen breathing apparatus. The first such physical examination shall be completed within 30 days prior to scheduled initial training.
(b) The operator shall have MSHA Form 5000-3 filled out and signed by a physician for each member of a mine rescue team and alternates. Such forms shall be kept on file at the mine rescue station for a period of two years.
(c) The following conditions shall disqualify a miner from mine rescue team service:
(1) Seizure disorder;
(2) Perforated eardrum;
(3) Hearing loss without a hearing aid greater than 40 decibels at 500, 1,000 and 2,000 Hz, using the ISO or ANSI scale;
(4) Repeated blood pressure (controlled or uncontrolled by medication) reading which exceeds 160 systolic, or 100 diastolic, or which is less than 105 systolic, or 60 diastolic;
(5) Distant visual acuity without glasses less than 20/50, snellen, in one eye and 20/70 in the other;
(6) Heart disease;
(7) Hernia;
(8) Major back surgery within the preceding year;
(9) Absence of a limb or hand.
(10) Any other condition which the examining physician determines renders the miner physically unfit for rescue team service.

§ 49.6 Requirements for team members and alternates.

Each member of a mine rescue team and alternates shall have been employed in an underground mine for a total of one year or more within the three preceding years prior to becoming a team member. Miners whose duties have required regular underground work prior to becoming a team member, even though they are stationed on the surface, shall be considered employed in an underground mine.

§ 49.7 Requirements for training of mine rescue teams; instructors; records of training.

(a) Each member of a mine rescue team and alternates shall complete a 20-hour initial course of instruction, as prescribed by the Office of Education and Training, MSHA, in the use, care, and maintenance of the type of breathing apparatus that will be utilized by the mine rescue team.
(b) Each member of a mine rescue team shall complete a 10-hour course of instruction, as prescribed by the Office of Education and Training, MSHA, in the use, care, capabilities and limitations of auxiliary mine rescue equipment where such teams are provided with auxiliary equipment.
(c) Each member of a mine rescue team and alternates shall complete a 20-hour course of instruction, as prescribed by the Office of Education and Training, MSHA, in advanced mine rescue procedures upon completion of the initial training.
(d) If the type of breathing apparatus is changed, the mine rescue team members and alternates shall have, as soon as is practicable, an additional 4 hours of training using the different breathing apparatus after the change is made.
(e) Each member of a mine rescue team and alternates shall receive first aid training and training in cardiopulmonary resuscitation which are approved by the Office of Education and Training, MSHA.
(f) Each member of a mine rescue team and alternates shall have current mine map training and be completely familiar with the mine ventilation, escape routes, and refuge chambers for each mine served by the rescue team.
(g) Prior to serving on a mine resuce team, each person shall have completed the training as prescribed in paragraphs (a), (b), (c), (d), (e) and (f) of this section.
(h) Thereafter, each member of a mine rescue team and alternates shall annually complete refresher training courses in first aid and cardiopulmonary resuscitation which are approved by the Office of Education and Training, MSHA.
(i) Each mine rescue team and alternates shall train at least 4 hours each month or 8 hours bimonthly. Training shall include the wearing and use of the breathing apparatus by the team members and alternates for a period of at least 2 hours while under oxygen bimonthly. A team member or alternate will be ineligible to serve on a team if more than 8 hours of training is missed during one year, unless additional training is received to make up for the time over 8 hours of training missed. All team members and alternates shall receive at leat 40 hours of trailing a year.
(j) Each mine rescue team shall train in the use of auxiliary mine rescue equipment where such equipment is provided. Training shall include the wearing and use of auxiliary breathing apparatus for a perod of at least two hours every six months. This training will be a part of the 40 hours of training as required each year by paragraph (i) of this section.
(k) The required training session shall be held underground at least once each 4 months, and the location of such underground training shall be rotated among the mines served by the teams.
(l) The training courses required by this section shall be conducted by in-

structors who have been approved by MSHA in any of the following ways:

(1) Instructors may satisfactorily complete a program of instruction approved by the office of Education and Training, MSHA, in the subject matter to be taught and either:

(i) take the instructor's training course conducted by the Office of Education and Training, MSHA, or

(ii) be designated by the Office of Education and Training, MSHA, to give such instruction;

(2) Instructors may be designated by the Office of Education and Training, MSHA, as approved instructors to teach specific courses based on their qualifications and teaching experience;

(3) Cooperative instructors who have been designated by the Office of Education and Training, MSHA, to teach MSHA-approved courses prior to the effective date of this part and who have taught such courses within the 24 months prior to the effective date of this part shall be considered approved instructors for such courses.

(m) The Chief of the Training Center may revoke an instructor's approval for good cause, which may include not teaching a course at least once every 24 months. A written statement revoking the approval together with reasons for revocation shall be provided the instructor. The affected instructor may appeal the decision of the Training Center Chief by writing to the Director of Education and Training, MSHA, 4015 Wilson Boulevard, Arlington, Va. 22203, within 30 days of notification of the Training Center Chief's decision. The Director of Education and Training shall render a decision on the appeal within 30 days after receipt of the appeal.

(n) The person who is in charge of the mine rescue team shall notify the Chief of the Training Center in the area where the mine rescue station is located of the schedule of training sessions which shall include the locations, times, and length of each session.

(o) A record of training of each team member and alternate as required in paragraphs (a), (b), (c), (d), (e), (f), (h), (i), (j), (k) and (l) of this section shall be on file at the mine rescue station for a period of two years.

§ 49.8 Mine rescue station.

(a) A mine rescue station, designated by a conspicuous sign, shall be adequate in size to conduct classes, unless other classroom facilities are readily available, and shall be provided with hot and cold running water, illumination, heating devices and a commercial telephone.

(b) Mine rescue stations shall be located no more than 60 minutes travel time by conventional ground transportation from the mine or mines to be served. In areas where mines are remotely located, greater distances may be approved by the District Manager based on information received under paragraph (b)(3) of § 49.2

(c) Mine rescue stations at mine sites shall be located on the surface and offset from any mine openings so as to protect the rescue station from forces coming out of the mine should an explosion occur.

(d) Authorized representatives of the Secretary shall have the right of entry to inspect any designated mine rescue station.

§ 49.9 Mine emergency notification plan and mine map.

(a) Each mine shall have a mine rescue notification plan outlining the procedures to follow in notifying the mine rescue team when there is an emergency that requires their services.

(b) A copy of the mine rescue notification plan and any cooperative or contractual agreement for the services of mine rescue teams shall be posted in the mine rescue station and in the mine office of the mine served by the rescue teams.

(c) The mine rescue notification plan shall be on a form supplied by MSHA.

(d) A copy of a current map of each mine served by the mine rescue station, updated no less than every six months or whenever significant changes are made such as changes affecting ventilation, escape routes or refuge chambers, shall be posted in the mine rescue station.

§ 49.10 Representatives of miners.

Each operator shall provide representatives of miners designated in accordance with Part 40 of this title a copy of (a) any notice submitted to the District Manager in accordance with § 49.2(c) of this Part regarding how the operator is ensuring mine rescue teams are available to the mine; (b) any cooperative or contractual agreement for the services of mine rescue teams; and (c) the current mine rescue notification plan.

[FR Doc. 79-198 Filed 1-4-79; 8:45 am]

Federal Register

FRIDAY, JANUARY 5, 1979
PART III

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Food and Drug Administration

■

LICENSING AND GENERAL BIOLOGICAL PRODUCTS STANDARDS

Bacterial Vaccines and Bacterial Antigens with "No U.S. Standard of Potency"

[4110-03-M]

Title 21—Food and Drugs

CHAPTER I—FOOD AND DRUG ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SUBCHAPTER F—BIOLOGICS

[Docket No. 77N-0091]

PART 601—LICENSING

PART 610—GENERAL BIOLOGICAL PRODUCTS STANDARDS

Bacterial Vaccines and Bacterial Antigens with "No U.S. Standard of Potency"

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) issues a final rule concerning the recommendations of the Panel on Review of Bacterial Vaccines and Bacterial Antigens with "No U.S. Standard of Potency." This rule contains labeling and informed-consent requirements as well as provisions for the presence of group A streptococcus in these products.

DATES: Effective January 5, 1979; requirements for labeling are effective July 5, 1979.

ADDRESS: Written comments to the Hearing Clerk (HFA-305), Food and Drug Administration, Rm. 4-65, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT:

Joe Holloway, Bureau of Biologics (HFB-620), Food and Drug Administration, Department of Health, Education, and Welfare, 8800 Rockville Pike, Bethesda, MD 20014, 301-443-1306.

SUPPLEMENTARY INFORMATION: In the FEDERAL REGISTER of November 8, 1977 (42 FR 58266), the Commissioner of Food and Drugs published a proposal containing findings of the Panel on Review of Bacterial Vaccines and Bacterial Antigens with "No U.S. Standard of Potency." The Panel evaluated the safety and effectiveness of 32 bacterial vaccine and bacterial antigen products and recommended that: (a) no products be placed in Category I (those biological products determined to be safe, effective, and not misbranded); (b) three products be placed in Category II (those biological products determined to be unsafe, ineffective or misbranded); (c) seven products be placed in Category IIIA (those biological products for which available data are insufficient to classify their safety and effectiveness but which may remain in the interstate commerce pending completion of testing and conformance with the recommendations of the Panel); and (d) twenty-two products be placed in Category IIIB (those biological products for which available data are insufficient to classify their safety and effectiveness and which should not continue in interstate commerce).

The Commissioner agreed with the Panel's recommendations concerning the classification of these products. Accordingly, the Commissioner announced his intention to publish a notice of opportunity for hearing to revoke the licenses for those products placed in Categories II and IIIB. The Notice of Opportunity for Hearing was published in the FEDERAL REGISTER of December 9, 1977 (42 FR 62162). Interested persons were advised that they could submit additional data in response to the revocation notices; for products placed in Category IIIA, comments or additional data concerning the classification were also invited.

In addition, the November 1977 proposal contained the Commissioner's responses to other panel recommendations concerning the testing, content, and labeling of bacterial vaccines and antigens. In view of these recommendations, the Commissioner proposed two amendments to the biologics regulations: (1) in § 601.25(h) (21 CFR 601.25(h)), to require that the labeling for Category IIIA bacterial vaccines and antigens contain a prominent boxed statement referencing the Panel's findings of insufficient data on safety and effectiveness, that written informed consent be obtained from participants in the additional studies performed pursuant to § 601.25(h), and that a patient information insert be included with category IIIA products continued in interstate commerce; and (2) in § 610.19 (21 CFR 610.19), to eliminate group A streptococcal microorganisms and their derivatives from bacterial vaccines and antigens. Comments on these proposals were also solicited by the Commissioner in the November 1977 proposal.

Because manufacturers of those licensed products placed in Categories II and IIIB either did not request a hearing, requested a hearing but submitted no additional data, submitted additional data which resulted in reclassification of products, or requested that the licenses be revoked, the Commissioner published in the FEDERAL REGISTER of October 27, 1978 (43 FR 50247), a notice that these licenses have been revoked. Nevertheless, the Commissioner has considered the comments submitted by patients and physicians concerning the classification of these products, as well as the comments on the proposed amendments to the biologics regulations. Interested persons were given until January 9, 1978 to file comments with the Hearing Clerk. Three hundred and twelve letters were received, many of which contained more than one comment. A summary of the comments and the Commissioner's responses are as follows:

1. Many comments supported two products which were classified in Category IIIB. These products are V-677 Streptococcus Vaccine and Entoral, both manufactured by Eli Lilly and Co. Two hundred and ninety-five comments requested reclassification of V-677 and public hearings to provide a forum for expression of the commentor's views. One hundred and five letters consisted of or included a form containing information in support of the safety and effectiveness of V-677. All of the comments contained testimonials in support of the product. The comments expressed the belief that V-677 is more effective for the treatment of arthritis than other drugs on the market and that, if V-677 is removed from the market, patients will be forced to accept the painful effects of arthritis or take drugs with dangerous side effects. In addition, the comments alleged that physicians may be subject to malpractice suits for not treating patients with the most effective drug, which, in the commentors' view is V-677. Many of the comments suggested that the costs for studies required to establish the safety and effectiveness of V-677 should be borne by the Federal government. An additional 300 comments were submitted by patients in support of the safety and effectiveness of Entoral, a cold preparation. These comments also contained reports of Entoral's value in individual cases.

The biologics safety and efficacy review procedures were first proposed in the FEDERAL REGISTER of August 18, 1972 (37 FR 16679). As stated in that proposal, because all biological products are also drugs within the meaning of the Federal Food, Drug, and Cosmetic Act, the requirements for demonstrating the effectiveness of drugs and prohibitions against their being misbranded apply to products which are also subject to the licensing provisions of section 351 of the Public Health Service Act. Although biological products have been reviewed for safety in the past, new criteria for safety, like the contemporary standards for demonstrating effectiveness, have developed in recent years.

After reviewing the comments on the proposal, the Commissioner issued a final order establishing the procedures for review of the safety, effectiveness, and labeling of biological products in the FEDERAL REGISTER of

February 13, 1973 (38 FR 4319). The preamble to that final order discussed the requirements that biological drugs be shown to be both safe and effective for all their intended uses.

Section 601.25 governing the review of biological products contains standards for safety and effectiveness. Section 601.25 provides that "proof of effectiveness shall consist of controlled clinical investigations," unless this requirement is waived on the basis of a showing that it is not reasonably applicable to the biological product or essential to the validity of the investigation. Alternate methods of investigation are appropriate only if they are "adequate to substantiate effectiveness." Although the regulations provide that partially controlled or uncontrolled studies, as well as significant human experience, may be used to corroborate controlled clinical studies, isolated case reports, random experience, and reports lacking the details which permit scientific evaluation will not be considered in support of the effectiveness of the drug. (See § 601.25(d)(2).) Section 601.25(d)(3) authorizes the panels to consider the benefit-to-risk ratio in determining safety and effectiveness.

Since promulgation of the regulations governing the review of the safety, effectiveness, and labeling of all biological products, the Supreme Court has reaffirmed that controlled clinical investigations constitute the contemporary standard and represent the well-established principles of scientific investigation. (See *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609 (1973).) Based upon the regulations and the law, the Commissioner finds that the testimonials submitted in support of V-677 and Entoral are not an acceptable alternative to scientifically valid proof of the safety or effectiveness of these products. As the Supreme Court noted, anecdotal reports about drug safety and effectiveness are, unfortunately, "treacherous." "The Panel concluded that the effectiveness and safety of treatment with a product for a given disease can be judged properly by adequate and well-controlled studies on populations of patients having the most well-defined disease states and carefully selected to be as homogenous as possible." (See the November 1977 proposal at 42 FR 58270 under "Areas of Panel Concern.") The Panel did, however, attempt to identify information that would corroborate the testimonial evidence and unconfirmed and uncontrolled clinical impressions that it received from both producers and individuals. Alternative methods for adequate and well-controlled studies were considered. None of these alternatives was considered to be sufficient to establish definitive effectiveness, for reasons articulated in the evaluation of each product. About safety, the Panel noted that safety claims "were based primarily upon the manufacturer's reports of adverse reactions. This might have been satisfactory had there been some evidence of systematic followup by physicians for the late, and perhaps subtle, adverse effects that might be associated with repeated inoculations. In view of what is known from laboratory studies about the potential risks associated with repeated inoculations of foreign substances, the Panel was left with reservations about the long-term safety of the subject products." (See the November 1977 proposal at 42 FR 58270-58271 under "Safety.") The Panel concluded that it "could not recommend waiver of these requirements [21 CFR 601.25(d)] on the basis of claims that a controlled clinical trial is not feasible because of lack of funding, lack of interest, or difficulty in obtaining a sufficient number of patients." (See the November 1977 proposal at 42 FR 58271 under "Panel Specific Product Reports and Reviews.")

The Panel's report reflects the careful consideration that the Panel gave to physician and patient reports submitted in support of licensed products. The Panel issued a position statement which was "prompted in large part by the expressed fears of many practicing physicians that Panel members will make arbitrary decisions and that the findings of doctors who had used these biologicals for many years will be discounted without careful consideration. This is not the intent of the Panel * * *." (See the November 1977 proposal at 42 FR 58272 under "Extent to Which Prior Use of These Products Can Be Used To Satisfy Present Standards of Safety and Effectiveness.") This statement makes clear that the views of those persons who have submitted comments on the Commissioner's proposal have already been thoughtfully considered. In discussing its evaluation of safety, the Panel identified exactly those problems which establish the need for scientifically valid and controlled studies: the lack of an effective mandatory system for reporting adverse reactions, that a practicing physician sees only a limited number of patients and therefore will identify only adverse reactions that occur at a very high rate, that patients with severe reactions may not return to the same treatment situation, and that a causal relationship is difficult to discern due to the time and other events between the administration of a drug and the onset of the adverse reaction. The Panel's summary clearly shows that every effort was made to give all reasonable credit to significant human experience during marketing. (See the November 1977 proposal at 42 FR 58272 under "Summary.")

The Commissioner notes that nondeliberative portions of all meetings of the Panel were open to the public. Announcements of the meetings were published in the FEDERAL REGISTER before each meeting, and interested persons were given an opportunity to make presentations to the Panel. No person who requested an opportunity to appear and make a presentation was denied that request. In addition, as part of the process of nominating qualified experts to serve on the Panel, the Commissioner issued letters to approximately 35 medical and scientific associations and consumer groups advising them of the review of bacterial vaccines and bacterial antigen products. Ample opportunity was given for public participation in the proceedings, and manufacturers had adequate time and opportunity to present additional data in support of continued licensure for their products. For these reasons, the request that additional public hearings be provided to present a forum for those disagreeing with the Panel's recommendations and the Commissioner's conclusions is denied.

The Panel reviewed and evaluated the reports submitted in support of the safety and effectiveness of V-677. As to effectiveness, the Panel found that the only "controlled" study was inadequate, that its result was inconclusive and that it "does not provide the data required for a positive judgment of the safety or effectiveness of V-677." (See the November 1977 proposal at 42 FR 58290 under b. *Effectiveness.*) The Panel concluded that the study had "deficiencies which seriously impair current usefulness." As to safety, the Panel concluded that the available data supporting the presumed safety of the product "may be more apparent than real" and that reported observations "posed questions of safety with regard to the chronic injection of such material into humans." (See 42 FR 58290 under a. *Safety.*) The Panel placed V-677 in Category IIIB because there is no substantial evidence of safety or effectiveness nor is there even evidence presumptive of safety.

The Panel reviewed the data submitted in support of Entoral's effectiveness and concluded that although the labeling for the product was cautiously worded, "the statement on use of the vaccine does imply effectiveness, but the implication is not supported by the evidence." (See the November 1977 proposal at 42 FR 58286 under c. *Labeling.*) The Panel found that "the vaccine has long since been put to the test of controlled clinical studies and found wanting." (See 42 FR 58286 under a. *Critique.*) None of the studies

reviewed by the Panel demonstrated claims for effectiveness. The Panel concluded that there was neither substantial nor presumptive evidence of effectiveness of Entoral.

The Commissioner adopted the Panel's recommendations on V-677 and Entoral and proposed that they be placed in Category IIIB. A notice of opportunity for hearing on the revocation of the license of Entoral was not published since the license for Entoral was revoked at the request of Eli Lilly and Co. on April 11, 1977.

In response to the notice of opportunity for hearing concerning V-677, Eli Lilly and Co. did not request a hearing or submit any data. Accordingly, their license was revoked. (See the October 27, 1978 Notice.)

The Commissioner advises that an opportunity for a hearing is directed to the manufacturer of a product whose license is the subject of the proposed revocation. If a hearing is requested by a manufacturer and granted, all interested parties may present evidence regarding the proposed revocation (21 CFR 12.45). However, in view of the failure by Eli Lilly and Co. to request a hearing, no further proceeding is available.

The Commissioner notes that there are numerous drugs other than V-677 which are marketed for the treatment of arthritis. For this reason, the Commissioner rejects the suggestion that revocation of the V-677 license will cause substantial adverse effects for current users of V-677 who must now select other arthritis drugs. Drugs recommended for treatment of arthritic conditions, like every other drug, have the potential for causing some side effects in some individuals. Generally, it is the responsibility of the physician prescribing these drugs to weigh the benefits against the risks involved in treatment of each individual patient and to ensure that the patient gains the maximum benefits with the least possible risks.

The Commissioner also notes that the classification of a product into Category IIIB does not preclude further studies. It requires only that the product not be marketed commercially while controlled studies are conducted in accordance with the IND provisions of the law. Those persons being treated with V-677 may serve as test subjects for the IND clinical trials. This mechanism provides for continued availability of a drug but only as part of a plan to study its safety and effectiveness. This mechanism also provides maximum protection to the test subjects. Thus, although the Eli Lilly and Co. licenses for both Entoral and V-677 have been revoked, the law does not prohibit investigational new drug use of either drug.

2. Thirteen comments, primarily from practicing physicians, asserted that Hoffman Laboratories' Respiratory Bacterial Antigen Complex (BAC), and Pooled Skin BAC are effective for upper respiratory and skin infections and cause no known side effects. These comments requested that these products be reclassified.

The Panel recommended that the Respiratory BAC be placed in Category IIIA on the condition that it not contain group A streptococcus strains and that the labeling state in standard medical terminology the specific indications for use. (See the November 1977 proposal at 42 FR 58296.) The Panel recommended that the Pooled Skin BAC be placed in Category IIIB. For both products, the Panel concluded that there was no substantial evidence of safety and effectiveness. The Panel found some presumptive evidence of safety for the respiratory BAC products but no presumptive evidence of safety for the pooled skin products. These conclusions were based on an extensive review of the data submitted in support of these products and, as specifically noted by the Panel, upon the consideration of numerous "letters, depositions, and reports from physicians and patients supporting the efficacy of respiratory BAC products." (See the November 1977 proposal at 42 FR 58295.) The Panel noted that the support for the effectiveness of these preparations in humans in "based entirely on uncontrolled studies, case reports, letters, and depositions from physicians and their patients." (See 42 FR 58295 under (2) *Effectiveness.*) The Panel found that the indications for use in the labeling "are extremely broad," and that the "present state of knowledge neither proves nor disproves the possibility that bacterial antigens or vaccines in general or these products in particular induce either of the [claimed] effects." The Panel also felt that the package insert "is totally inadequate" in guiding the physician user's selection among the four products marketed. "Published articles supplied by the manufacturer, at the specific request of the physician, failed to provide adequate guidance." (See the November 1977 proposal at 42 FR 58296 under (4) *Labeling*). Hoffman Laboratories requested the revocation of their licenses for the manufacture of all of their licensed biological products. The comments recommending that these products be upgraded are rejected.

3. The Panel recommended that the Federal government sponsor some of the studies required to establish the safety and effectiveness of bacterial vaccines and bacterial antigen products. In response to that recommendation, the Commissioner noted that the regulations provided for such studies in § 601.25(h)(1) and acknowledged that such studies may be desirable and beneficial. Accordingly, the Commissioner solicited comments on the proposal by the Panel for the expenditure of Federal funds to study these products.

In response to that invitation, seven comments were received, all of which supported the expenditure of Federal funds for additional studies of products in category IIIA. The comments suggested that Federal support was necessary because the cost for the required studies would be prohibitive for small manufacturers. In view of the Panel's recommendation and the responses submitted, the Director, Bureau of Biologics, will notify the appropriate Federal agencies so that such studies may be considered and priorities assigned. The FDA budget does not provide for developmental research in support of marketed products because the law places this burden upon the proponent or manufacturer.

4. Two comments suggested that the Commissioner permit ineffective bacterial vaccines to remain on the market as placebos for psychological effects.

Ineffective drugs may not be lawfully sold or distributed in interstate commerce. Such drugs are misbranded and are new drugs within the meaning of the Federal Food, Drug, and Cosmetic Act. Unlike true placebos, ineffective drugs may cause physiological or pharmacological effects in addition to the psychological (placebo) effects. Therefore, the use of ineffective drugs as placebos is inconsistent with sound medical practice. Accordingly, the comments are rejected.

5. Two comments objected to the statement in item 1b. of the proposal's preamble at 42 FR 58315, that "safety and effectiveness of the products rest largely upon information, in the form of anecdotes and results of informal studies, which were collected during the long years of use of the products." The comments state that the statement is not true for some products placed in Category IIIA by the Panel. However, the comments did not identify any specific product or provide data to support their objection.

The Commissioner advises that the Panel's conclusions were based on data the manufacturers submitted in support of the products, other medical literature, and oral presentations by interested persons and manufacturers at the Panel's meetings. The statement in item 1b. of the proposal's preamble applies to all products placed in Category IIIA. Therefore, the comments are rejected.

6. One comment noted that *Staphylococcus albus* and *Staphylococcus*

aureus were incorrectly listed as components of the Hollister-Stier products classified as Category IIIB by the Panel. The organisms should have been listed as components of the Hollister-Stier products that were classified as Category IIIA by the Panel.

The Commissioner agrees with this comment. Therefore, the organism listing of *Staphylococcus albus* and *aureus* is corrected on the official agency copy of the proposal. This correction was also made in a notice published in the FEDERAL REGISTER of October 27, 1978.

7. One comment suggested that the Commissioner require in vivo studies in humans before a drug is marketed because treatment is usually given to a patient with a complicated disease process and in vitro results do not necessarily forecast the actual effects of the drug when used in humans.

The Commissioner advises that the requirements in §§ 601.21 and 601.25 already preclude the marketing of a drug in interstate commerce until there is substantial evidence of effectiveness derived from adequate and well-controlled investigations, including clinical investigations. Such studies include use in susceptible persons and should be sufficient to establish the pharmacological effects of the drug when used in the manner and by the mode of administration suggested in the manufacturer's labeling. Accordingly, the Commissioner believes there is no apparent need to change this requirement and the comment is rejected.

8. In conjunction with the proposal to place certain products in Category IIIA and in view of the Panel's conclusions concerning the effectiveness of Category IIIA drugs, the Commissioner proposed that (1) the circular and promotional material for these drugs must have a prominent boxed statement referencing the need for further data to fully establish effectiveness; (2) written informed consent be obtained from participants in the requisite additional studies, an explanation of the product and the purpose of the study be given to such participants, and a clear opportunity be provided to them to refuse to participate in the study; and (3) a printed patient insert be included with all Category IIIA Bacterial Vaccines and Bacterial Antigens which have been designated as having "No U.S. Standard of Potency" continued in interstate commerce. The requirements for the boxed warning and informed consent were the same as those proposed by the Commissioner in the FEDERAL REGISTER of September 30, 1977, in the proposal concerning the implementation of the report of the Panel on Review of Skin Test Antigens.

One comment was received in response to the proposed labeling. It stated that the requirement for a prominent boxed warning will cause a marked reduction in the use of the products identified with this notice.

As the Commissioner noted in the proposal, the conclusion by an expert panel that the data in support of the products' safety and effectiveness are currently insufficient is a material fact within the meaning of section 201(n) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(n)) and the failure to disclose this fact is misleading, resulting in the products being misbranded. Moreover, the Commissioner believes that it is essential that patients and physicians be aware of the lack of controlled studies in support of a product. In addition, the Commissioner notes that a boxed warning concerning the results of expert panel reviews has been used for many years in conjunction with drugs which were the subject of the efficacy review panels in the 1960's. (See § 201.200 (21 CFR 201.200).) Accordingly, the comment is rejected.

However, the Commissioner has decided that the adoption of the boxed warning and written informed consent for participants in studies conducted on Category IIIA products (§ 601.25(h)(4) and (5)) should be promulgated upon specific notice to those persons affected by the review of each category of biological products. Accordingly, this final order imposes these requirements for Bacterial Vaccines and Bacterial Antigens with "No U.S. Standard of Potency" only. When the final order is published for skin test antigens, the Commissioner will consider the application of these requirements to those particular products.

9. Three comments from manufacturers and manufacturer associations stated that § 610.25(h)(6) should not be amended to require a printed patient insert because the presence of a printed patient insert may result in the patient's refusal to take medications bearing such labeling. One comment stated that FDA has no legal authority to require such patient labeling.

FDA is charged with assuring that licensed biologics are safe and effective for their intended uses and that essential information concerning contraindications and warnings is fully disclosed to physicians. Accordingly, the Commissioner has reviewed the recommendations of the Panel regarding Category IIIA products, taking into account the following factors. The Panel stated:

> Justification for placing products in Category IIIA is presumptive evidence of effectiveness and safety. Although not clearly stated, the implication is that such suggestive evidence can be largely derived from the fact that many of the products have been widely used for many years and that although systematic rigorous trials may not have been done, the lack of reported dangerous side effects over a period of many years indicates in itself at least a certain degree of safety. Effectiveness can be looked at in the same way.

The Panel also noted that:

> Claims for safety were based primarily upon the manufacturers' reliance on long marketing experience and infrequent physicians' reports of adverse reactions. This might have been satisfactory had there been some evidence of systematic followup by physicians for the late, and perhaps subtle, adverse effects that might be associated with repeated inoculations. In view of what is known from laboratory studies about the potential risks associated with repeated inoculations of foreign substances, the Panel was left with reservations about the long-term safety of the subject products.

These products are administered repeatedly and over long periods of time. The medical profession generally recognizes that other therapies are available for the conditions for which these products are used. There is no present assurance that persons treated with these products are being made aware of the potential for risk or of the availability of alternative modes of treatment.

It was for these reasons that the Panel explicitly stated:

> Vaccines and antigens that have been recommended for Category IIIA, i.e., licensure permitted to continue for a limited time while further studies are done, require separate considerations on labeling.
>
> * * * Useful information about safety and effectiveness should be provided directly to patients who receive products continued in use. The package insert or circular used to satisfy the need for consumer information should contain the updated information provided to the prescribing physician. The package insert or circular given to the patient and physician should also state in boldface, at the beginning, that this product is under review by FDA for a limited time since safety and effectiveness have not been substantially established. In particular, it should be noted that adequately controlled human trials have not been done.

Accordingly, the Panel recommended that the labeling "include a patient information insert."

In view of the foregoing, the Commissioner concludes that it is in the public interest to provide users of these particular Category IIIA products with notice of those factors that concerned the Panel.

Therefore, the Commissioner also concludes that a procedure must be developed for providing this information to prospective users of these products. A proposed procedure is now being developed by the agency and will be published in the FEDERAL REGISTER as soon as possible.

The Commissioner notes, and concurs with the Panel's finding regarding, the specific characteristics of these products which distinguish them from other licensed biologics and from other drugs, and which therefore make it necessary, in the judgment of the Panel and the Commisssioner, to provide information to prospective users. In this respect the Panel stated:

> While all licensed biologics are undergoing reviews for safety, effectiveness, and appropriateness of labeling at this time, the products assigned to this Panel have several characteristics that distinguish them from other categories of vaccines and antigens.

This finding resulted from problems summarized by the Panel as follows:

> 1. The etiologies and pathogeneses of many conditions treated with "bacterial vaccines and antigens" and the way in which they might prevent or alleviate the pathologic state are not well understood.
> 2. The causal relationships of the species or strains of vaccine organisms (or derivatives) to the diseases for which they are prescribed are generally unclear.
> 3. Standards of potency are needed, including precise indentification of the contents of the finished products.
> 4. Patients treated for many of the recommended conditions represent highly heterogeneous subgroups whose conditions and symptoms are noticeably labile and difficult to characterize objectively. These subpopulations should be defined and identified.
> 5. Data on the rate and significance of spontaneous remissions in the chronic disorders for which these products are used are not available.
> 6. The rationale by which the selection of bacterial strains for incorporation in a given product often was either not clear or not stated.
> 7. The need to include different bacterial strains (and species) into one vehicle was not documented.

It should be noted that the policy to require labeling directed to the patient for certain prescription products as required by specific circumstances is already established and being followed by the agency. (See § 310.501, as amended in the FEDERAL REGISTER of January 31, 1978 (43 FR 4214) for oral contraceptives; § 310.515 (21 CFR 310.515), promulgated by final order published in the FEDERAL REGISTER of July 22, 1977 (42 FR 37636) for estrogenic drugs; and § 310.516 (21 CFR 310.516), promulgated by final order published in the FEDERAL REGISTER of October 13, 1978 (43 FR 47178) for progestational drugs.) The authority to promulgate patient package insert information for drugs, including biological drugs subject to section 351 of the Public Health Service Act, is stated in the preambles of these final orders, as well as in the general labeling proposal published in the FEDERAL REGISTER of April 7, 1975 (40 FR 15392). This authority has been preliminarily upheld by the one court that has reviewed the issue (*Pharmaceutical Manufacturers Association* v. *FDA*, Civ. No. 77-291 (D. Del., October 5, 1977) (order denying preliminary injunction)). For a general explanation of FDA's rulemaking authority, see *National Nutritional Foods Association* v. *Weinberger*, 512 F.2d 688, 695-698 (2d Cir. 1975).

10. Two comments on proposed § 610.19 suggested that the regulation should be redrafted because it now appears to prohibit the use of group A streptococcus organisms under all circumstances.

The Commissioner advises that § 610.19 (21 CFR 610.19) prohibits the interstate marketing of any Bacterial Vaccines and Bacterial Antigens with "No U.S. Standard of Potency" which contain group A streptococcus organisms and their derivatives. However, the regulation does not prohibit the presence of these organisms in bacterial products subject to investigation under the investigational new drug provisions of the law and consistent with 21 CFR Part 312. the Commissioner finds the currently drafted regulation clear and rejects the comment.

The Commissioner considered the comments and other relevant information and concludes that the proposal on the Panel's recommendations concerning the Classification of products into Categories I, II, IIIA, and IIIB should be and is hereby adopted, with changes, as set forth below.

a. Category I—*Biological products determined to be safe and effective and not misbranded that should continue in interstate commerce.* None of the Bacterial Vaccines and Bacterial Antigens with "No U.S. Standard of Potency" was placed into this category.

b. Category II—*Biological products determined to be unsafe or ineffective or to be misbranded that should not continue in interstate commerce.* Product licenses for Category II products were revoked as announced in the FEDERAL REGISTER notice of revocation and reclassification on October 27, 1978 (43 FR 50247).

c. Category IIIA—*Biological products for which available data are insufficient to classify their safety and effectiveness but which may remain in interstate commerce.* Respiratory UBA (UBA-32) manufactured by Eli Lilly and Co., licensed No. 56; Respiratory B.A.C. manufactured by Hoffmann Laboratories, Inc., license No. 283; Staphylococcal B.A.C. manufactured by Hoffmann Laboratories, Inc., license No. 283; Bacterial Vaccines Mixed Respiratory (MRV or MRVI) manufactured by Hollister-Stier, Division of Cutter Laboratories, license No. 8; Bacterial Vaccines for Treatment, Special Mixtures containing only the following organisms—*Staphylococcus* (*aureus* and *albus*), *Streptococcus* (*viridans* and nonhemolytic) *Diplococcus pneumoniae, Neisseria catarrhalis, Klebsiella pneumoniae, Haemophilus influenzae* manufactured by Hollister-Stier, Division of Cutter Laboratories, license No. 8; Staphylococcus Toxoid Sclavo manufactured by Istituto Sieroterapico Vaccinogeno Toscano "Sclavo," license No. 238; Staphylococcus Toxoid; Formalinized: Dilution No. 1, Dilution No. 2; Digest-Modified manufactured by Lederle Laboratories Division, license No. 17; and Staphage Lysate (SPL) Type I and Types I and III combined manufactured by Delmont Labs, Inc., license No. 299. Licenses remain in effect for these products pending conformance with the Panel's recommendations and completion of testing (except that, at the request of Hoffmann Laboratories, Inc., their license to manufacture Respiratory B.A.C. and Staphylococcal B.A.C. was revoked as announced in the October 27, 1978 FEDERAL REGISTER notice of revocation and reclassification).

For products now herein classified in Category IIIA for which license revocations have not been issued at the request of the licensee, manufacturers shall submit, within 30 days following publication of this order, a written statement of those studies which the licensee proposes to undertake to resolve the questions raised about the products. If no such commitment is made or adequate or appropriate studies are not undertaken, the Commissioner shall institute procedings to revoke the license (21 CFR 601.25(h)(1)). Licenses for Category IIIA products will remain in effect pending the conduct of studies as recommended by the Panel and adopted by the Commissioner. Labeling changes recommended by the Panel and now adopted by the Commissioner shall become effective on July 5, 1979. Because data submitted by Delmont Laboratories, Inc., have been found to be adequate to reclassify its staphage lysate types I and II combined, license No. 299, from Category IIIB to IIIA, the requirements concerning completion of testing and labeling apply to these products.

Additional background data and information on which the Commissioner relies in promulgating these regulations are on public display in the office of the Hearing Clerk (HFA-305), Food and Drug Administration, Rm. 4-65, 5600 Fishers Lane, Rockville, MD 20857.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 201, 502, 505, 701, 52 Stat. 1040-1042 as amended, 1050-1053 as amended, 1055-1056 as amended by 70 Stat. 919 and 72 Stat. 948 (21 U.S.C. 321, 352, 355, 371)), the Public Health Service Act (sec. 351, 58 Stat. 702 as amended (42 U.S.C. 262)), and the Administrative Proce-

dure Act (secs. 4, 10, 60 Stat. 238 and 243 as amended (5 U.S.C. 553, 702, 703, 704)), and under authority delegated to the Commissioner (21 CFR 5.1), Parts 601 and 610 are amended as follows:

1. In Part 601, § 601.25 is amended by revising the heading of paragraph (h) and adding new paragraph (h) (4) and (5) to read as follows:

§ 601.25 Review procedures to determine that licensed biological products are safe, effective, and not misbranded under the prescribed, recommended, or suggested conditions of use.

* * * * *

(h) *Additional studies and labeling.*

* * *

(4) Labeling and promotional material for Bacterial Vaccines and Bacterial Antigens with "No U.S. Standard of Potency" requiring additional studies shall bear a box statement in the following format:

> Based on a review by the Panel on Review of (insert name of appropriate panel) and other information, the Food and Drug Administration has directed that further investigation be conducted before this product is determined to be fully effective for labeled indication(s).

(5) A written informed consent shall be obtained from participants in the requisite additional studies for Bacterial Vaccines and Bacterial Antigens with "No U.S. Standard of Potency" explaining the nature of the product and the investigation. The explanation shall consist of such disclosure and be so made that intelligent and informed consent be given, and that a clear opportunity to refuse is presented.

* * * * *

2. In Part 610, new § 610.19 is added to Subpart B to read as follows:

§ 610.19 Status of specific products; Group A streptococcus.

The presence of Group A streptococcus organisms and derivatives of Group A streptococcus in Bacterial Vaccines and Bacterial Antigens with "No U.S. Standard of Potency" may induce dangerous tissue reactions in humans. Available data demonstrate that they are unsafe as ingredients in products for human use. Group A streptococcus organisms and derivatives of Group A streptococcus are prohibited from Bacterial Vaccines and Bacterial Antigens with "No U.S. Standard of Potency." Any Bacterial Vaccine or Bacterial Antigen with "No U.S. Standard of Potency" containing Group A streptococcus organisms or derivatives of Group A streptococcus in interstate commerce is in violation of section 351 of the Public Health Service Act (42 U.S.C. 262).

* * * * *

EFFECTIVE DATE. This regulation becomes effective January 5, 1979, except that the labeling requirements become effective July 5, 1979.

(Secs. 201, 502, 505, 701, 52 Stat. 1040-1042 as amended, 1050-1053 as amended, 1055-1056 as amended by 70 Stat. 919 and 72 Stat. 948 (21 U.S.C. 321, 352, 355, 371); sec. 351, 58 Stat. 702 as amended (42 U.S.C. 262); secs. 4, 10, 60 Stat. 238 and 242 as amended (5 U.S.C. 553, 702, 703, 704).)

Dated: December 22, 1978.

DONALD KENNEDY,
Commissioner of Food and Drugs.

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Federal Register

FRIDAY, JANUARY 5, 1979
PART IV

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

■

IMPORTATION OF PET BIRDS

Proposed Restrictions

[3410-34-M]

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[9 CFR Part 92]

PROPOSED RESTRICTIONS ON IMPORTATION OF PET BIRDS

AGENCY: Animal and Plant Inspection Health Service, USDA.

ACTION: Proposed Rule.

SUMMARY: This document proposes to amend the regulations concerning the importation of pet birds into the United States and gives notice requiring importers to reimburse Veterinary Services for all costs incurred which are associated with the importation of such birds. The present regulations are very difficult to administer and certain deficiencies have been found that should be corrected to adequately protect poultry in the United States from the introduction and spread of exotic Newcastle disease. Additionally, the need exists for Veterinary Services to recover costs associated with providing services required by this activity. The intended effect of the proposal would be to revise the manner in which pet birds are imported into the United States sufficient to prevent the undue risk of spread of disease, and to provide for the recovery of costs incurred by Veterinary Services in providing services required by the importer which are associated with the importation of such birds.

DATE: Comments on or before March 6, 1979.

ADDRESS: Written comments to Deputy Administrator, USDA, APHIS, VS, Room 817, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

FOR FURTHER INFORMATION CONTACT:

Dr. George P. Pierson, USDA, APHIS, VS, Import-Export Staff, Room 817, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8170.

SUPPLEMENTARY INFORMATION: Notice is hereby given in accordance with the administrative procedure provisions in 5 U.S.C. 553, that, pursuant to section 2 of the Act of February 2, 1903, as amended; and sections 2, 3, 4, and 11, of the Act of July 2, 1962 (21 U.S.C. 101-105, 111, 134a, 134b, 134c, and 134f), the Animal and Plant Health Inspection Service is considering amending Part 92, Title 9, Code of Federal Regulations.

In accordance with the provisions of 9 CFR Part 92, pet birds, intended for the personal pleasure of their individual owner and not for resale, can enter the United States upon inspection at specified ports of entry, where a determination of freedom from poultry diseases is made. Further, the pet birds must be accompanied by a declaration signed by the owner that the bird or birds were in his possession for a minimum of 90 days preceding importation and were not in contact with poultry or other birds during that period. In addition, at the time of entry, the owner is required to sign an agreement stating that the birds will be maintained in confinement in his or her personal possession separate and apart from all poultry and other birds for a minimum period of 30 days following importation at a place approved by the Deputy Administrator; that such birds will be made available for health inspection and testing by Department inspectors upon request until released at the end of such period; and that appropriate Federal officials in the State of destination will be immediately notified if any of the birds die or signs of disease are noted in any of the birds during that period.

Procedures as outlined have been most difficult to administer and certain deficiencies have been noted which should be corrected in order to protect poultry of the United States against the threat of the introduction and spread of exotic Newcastle disease via this source.

Chief among these deficiencies are the inability to adequately control the time and place of arrival of these birds in the United States, and the lack of adequate control over such birds once they have been released to the owner under the agreement for completion of the 30-day confinement and health inspection period. Since an import permit is not required for pet birds, the Department is not notified of the importation until the birds have arrived at a port of entry for inspection. Therefore, Department personnel may not be available to handle such shipments at the time the birds are presented for entry. Further, the owner may be inconvenienced by having to return at a later date to complete the entry procedure for his birds. These problems would be solved in this proposal by requiring advance reservation for quarantine space for importation of such birds with the owner providing the anticipated time and place of arrival with the request for space. This should facilitate the efficient inspection and handling of such shipments.

The lack of adequate control over such birds following their inspection and release at the port of entry under agreement creates a serious and potentially dangerous problem. Certain of the agreements have been falsely executed, containing fictitious names and addresses of owners. Further, other importers have sold the birds during the 30-day inspection and testing period and have reported their accidental escape when requested to present them for health inspection by Department inspectors. Still others have reported that the birds died during the holding period, but only after having been contacted by State or Federal officials and not on their own accord as the agreement intended.

During fiscal year 1976, more than 800 birds were refused entry, and a majority were subsequently destroyed. For fiscal year 1977 this figure increased to more than 2,000 birds which were refused entry. Most of these birds were refused entry because of their failure to qualify as personally owned pet birds. It should also be noted that, unlike birds classified as poultry, pet birds are not required to undergo a 30-day quarantine period, but are only required to be held on the premises of destination for 30 days following entry.

The proposed requirement for an advanced reservation for space at a quarantine facility should decrease the number of birds required to be destroyed by making importers more aware of entry requirements and insuring that certain pre-entry requirements can be met before such birds are presented for entry in to the United States. By requiring pet birds to be quarantined and inspected or 30 days before release, it would appear that the chance of introducing disease through this source would be further diminished. Also, transporting airlines would be advised of requirements for entry and encouraged not to accept birds for shipment in the country of origin which do not meet the requirement for entry into the United States.

The quarantine facilities would be operated by the U.S. Department of Agriculture, as the privately owned and operated facilities handle their own commercial shipments of birds. The private facilities are operated on an "all-in", "all-out" basis to prevent the release of any bird exposed to exotic Newcastle disease. This makes it difficult, if not impossible, to handle multiple shipments, especially when the shipments consist of one or two birds. By using isolation units developed by the U.S. Department of Agriculture, small, multiple shipments of birds could be handled other than on an "all-in", "all-out" basis without risking the spread of disease from one group of birds to another.

Cloacal samples from live birds and tissue samples from dead birds would be collected during the quarantine and submitted to the National Veterinary Services Laboratories for virus isolation studies to ascertain that the birds are free of exotic Newcastle disease. However, test specimens may be taken to determine the presence of any other communicable disease, if the

Deputy Administrator or his delegatee determines that there is reason to believe that the bird may have any other communicable disease.

The importer would pay for services rendered at the USDA-operated quarantine facilities. A fee schedule for such services would be established and would be obtainable from the Deputy Administrator, USDA, Veterinary Services, APHIS, Federal Building, Room 817, 6505 Belcrest Road, Hyattsville, Maryland 20782.

The charge for services would involve costs for initial entry service, required inspection service, services for feed, care and handling during quarantine, shipping charges for forwarding diagnostic specimen collected to the laboratory for examination, and laboratory costs incurred by the Department. The initial entry service costs would include travel to and from port and/or quarantine station, meeting birds at the port of entry, escorting birds to the quarantine facility, and inspecting birds upon arrival.

Required inspection service costs would include inspection of birds for evidence of disease, swabbing of live birds, the post mortem examination of dead birds, sample preparation, preparation of reports and supervision of cleaning and disinfection of the isolation unit after the release of birds. The charge would be made on a per-bird basis and to cover the entire quarantine and inspection period, including the cost of care, feed, and handling.

It was necessary to project certain costs to arrive at a fee schedule since actual costs for this type activity are not available. Some information was extracted from the present bird import program and was combined with appropriate projections to arrive at a reasonable and equitable fee schedule.

These projections were based on the assumption that the average rate of occupancy in quarantine facilities would be 80 percent, and that 3,700 lots consisting of 5,550 birds would be handled annually.

Hourly employee costs were calculated using the average hourly costs for each category of employee, i.e., veterinary medical officer, animal health technician, and bioaid. Using this average, the projected cost for labor at each facility would be $21,019 annually.

The cost estimate for processing laboratory samples was based on data taken from the actual cost of operating the section of the National Veterinary Services Laboratories concerned with tests for VVND. The total cost of testing specimens for VVND was averaged by the number of specimens tested during Fiscal Year 1977. Cost of shipping specimens is included in the total cost. The average laboratory cost for each facility was projected to be $10,290 annually.

The average annual cost of utilities at each facility was projected to be $2,454 and the average estimated cost of supplies was projected to be $1,168 each year.

Feed cost for each bird will vary but was projected to average at least $5.00 per bird for the entire quarantine period. The average annual cost for feed at each facility is projected to be $2,380.

Using all the above data, a total annual cost of $336,000 would be required for the operation of pet bird quarantine facilities. By assuming that one-half of the lots imported will be comprised of one bird and the other one-half of the lots will contain two birds, an average cost of $80.67 for one bird and $101.40 for two birds when housed together was calculated. Because all costs were estimated, the rates were rounded to $80 for one bird and $100 for two birds when housed together.

The above cost projections include an overhead factor of 16.85 percent, the percentage of Animal and Plant Health Inspection Service's Fiscal Year 1977 funds used for overhead. The overhead includes all administration costs such as regional and area offices, headquarters staff, Office of the Deputy Administrator and Administrator and all support functions such as budget and personnel operations.

In addition to the projected charge for services of $80 for one bird or $100 for two birds, for which the importer would reimburse Veterinary Services, the importer may have other expense at the time of entry. Such expense will vary from port to port, depending upon the distance the birds must be transported from the port to the quarantine facility, the availability of the importer at the time of entry and release of the bird or birds, and the ability of the importer to make an informal customs entry. Such costs are estimated to be an average of $50 for trucking and brokerage service respectively.

The proposed regulations would also specify the ports at which pet birds may be imported into the United States.

In Fiscal Year 1977, more than 49 percent of all lots of pet birds were offered for entry at the three ports of entry (New York, New York; Miami, Florida; and Honolulu, Hawaii) where the Department operates quarantine facilities. An additional 22 percent of the lots was offered for entry at ports where proposed USDA-operated facilities would be available. Therefore, approximately 71 percent of all pet birds offered for entry in fiscal year 1977 would have been offered at ports designated as quarantine stations under § 92.3(e) of the regulations as proposed herein. The remaining approximate 29 percent not offered at the designated ports would have to be refused entry or transported to ports with such facilities. Section 92.3(3)(iii) would provide that pet birds may be transported at the owner's expense to a port of entry designated in § 92.3 if available quarantine space exists, if the $40 reservation fee is paid by the importer and if shipments are made under conditions deemed sufficient by the Deputy Administrator to prevent the spread of communicable diseases of poultry.

It is proposed that a new § 92.2(c)(1) be added to allow pet birds from Canada and pet birds which have not been out of the United States for longer than 60 days to be permitted entry at any port specified in § 92.3. As explained subsequently in this supplementary information, it is proposed that such pet birds will not be required to be quarantined. Therefore, the entry of such pet birds would not have to be restricted to ports where pet bird quarantine facilities are maintained.

Adoption of this proposal should result in conservation of personpower and funds since the necessity for field inspection would be eliminated. A conservative estimate of personpower saved would be four person-years.

We believe that requiring an advance reservation for space prior to shipment of all pet birds from the country of origin, together with a health certificate issued by a national government veterinarian of the country of export and the subsequent 30-day quarantine will make importers more aware of the requirements for entry of pet birds and will result in improved compliance with entry requirements and a reduced likelihood of the introduction or dissemination of animal disease into the United States.

The information required on the health certificate should help insure that the bird is not diseased and that it is eligible for entry into the United States. The certifying official would also certify that the bird is being exported in accordance with the laws and regulations of the country of export. Such information should help insure that the Department is not assisting an importer in violating the laws of the country of export. Further, this should aid the Department of Interior in enforcing the Endangered Species Act and the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Such action would also appear consistent with the provisions of § 7 of the Endangered Species Act.

The regulations would also provide that no more than two pet birds per family can be imported pursuant to the pet bird provisions, except for non-

psittacine pet birds from Canada. This is proposed in order to bring the Department's regulations into correlation with the U.S. Public Health Service's regulation which has a similar limitation on the number of psittacine birds which may be imported into the United States. Those individuals who have more than two birds to offer for entry per calendar year may follow the provisions in the regulations for importing a commercial shipment of birds.

Since Public Health Service's regulations only restrict the entry of psittacine birds, the proposed regulations would authorize the Deputy Administrator to permit a family to import more than two non-psittacine pet birds from Canada when he determines that such importation does not constitute an undue risk of introducing or disseminating any communicable disease of poultry. Canada has adopted effective animal disease eradication and control programs similar to the United States and therefore, it appears that more than two non-psittacine pet birds should be able to be imported into the United States without undue risk of the introduction of disease.

The regulations would also be amended to provide that health certificates be translated into English at the importer's expense. English documents are needed to facilitate the importation of the birds and since generally the United States taxpayer does not derive a benefit from the importation, the importer, who derives a benefit, should be responsible for the translation of foreign certificates into English.

An advance reservation fee would be required to provide a means for the importers of such birds to guarantee themselves space for handling their birds. Since there are a limited number of available quarantine spaces, those persons with reservations will be accommodated first. In those cases where the importer has no reservation the regulations provide that his shipment may be handled if space is available and the reservation fee is paid at that time. A $40 reservation fee would be required because this represents the minimum fee for a 30-day quarantine period at a quarantine facility operated by the Department.

As noted previously, a lot consisting of no more than two pet birds which originated in the United States and have not been outside of the country for more than 60 days and pet birds from Canada would be the only pet birds allowed entry under the provisions of the proposed regulations without quarantine. As stated above, Canada has adopted effective animal disease eradication and control programs similar to the United States and, therefore, additional requirements for pet birds from Canada should not be necessary.

Further, pet birds which have not been out of the United States for an extended period of time should constitute a less significant threat to spread disease upon return to the United States because a presumption exists that the birds were not diseased when they left the United States. In view of the short time they are out of the country, it appears reasonable to believe that there is less likelihood that the birds came in contact with diseased birds while outside the country. Pet birds generally do not come in contact with other avian species while outside the United States. A 60-day time period is proposed because this should provide the pet bird owner the ability to travel abroad and return to the United States without too many restrictions and yet afford sufficient protection to the United States to prevent the introduction of communicable diseases. However, in order to insure that the birds have not been out of the United States for a period exceeding 60 days, the returning birds would be accompanied by the United States veterinary health certificate issued prior to departure of the birds from the United States. The certificate would show the tattoo number or leg band number affixed to the bird in order to help insure that the birds covered by the certificate are the birds being offered for re-entry.

This proposed rulemaking would also revise § 92.4(b) of the regulations to extend the time during which permits are valid for the importation of commerical, zoological and research birds from 14 to 30 days and performing or theatrical birds from 14 to 90 days. These changes were previously published on August 11, 1975 (40 FR 33649). However, in subsequent amendments to § 92.4(b) these changes were inadvertently omitted from the amended section. The extension of time for performing or theatrical bird permits was made in order to allow flexibility which is required and is justified by the manner in which birds and poultry of this type are handled and maintained. The extension of time was made for permits issued for commercial, zoological and research birds to allow importers greater flexibility in meeting international shipping schedules and restrictions.

Further, the proposed regulations would also amend § 92.2(a) to authorize the Deputy Administrator upon request in specific cases to permit birds to be brought into or through the United States under such conditions as he may prescribe, when he determines in the specific case that such action will not endanger the livestock or poultry of the United States. Situations have arisen, particularly with respect to pet birds, where birds presented for entry into the United States have not strictly complied with all the requirements for importation, for example, where the bird becomes separated from the documents required to accompany the bird. Under the present regulations such birds must be refused entry. The proposed amendment would provide some relief to the importer, especially a tourist who may not be familiar with the Department's regulations. Such entry, however, will only be granted if the Deputy Administrator determines that conditions adequate to prevent the introduction of communicable disease can be established.

Accordingly, Part 92, Title 9, Code of Federal Regulations, would be amended in the following respects:

1. In § 92.2, that portion of paragraph (a) following the colon would be amended to read:

Provided, That, the Deputy Administrator may upon request in specific cases permit animals or products or birds to be brought into or through the United States under such conditions as he may prescribe, when he determines in the specific case that such action will not endanger the livestock or poultry of the United States.

2. In § 92.2, the phrase "or pet birds" would be added after the phrase "research birds" in the first sentence of paragraph (f) and paragraph (c) would be amended to read:

§ 92.2 General prohibitions; exceptions.

* * * * *

(c)(1) A lot consisting of no more than two pet birds per family offered for entry from Canada and which are not known to be affected with or exposed to any communicable disease of poultry, which are caged (prior to release from the port of entry) and which are personal pets, may be imported by the owner thereof at any port of entry designated § 92.3: *Provided, That,* such birds are found upon port of entry veterinary inspection under § 92.8 to be free of poultry diseases and at the time of entry the owner signs and furnishes to the Deputy Administrator, Veterinary Services, a statement stating that the bird or birds have been in his possession for a minimum of 90 days preceding the date of importation and that during such time such birds have not been in contact with poultry or other birds (for example, association with other avian species at exhibitions or in aviaries). *And provided further,* That the Deputy Administrator, Veterinary Services, may upon request in specific cases, permit the importation in accordance with the conditions prescribed in this paragraph of more than two non-psittacine birds that are per-

sonal pets, when he determines in the specific case that such importation will not involve a risk of introduction or spread of any communicable disease of poultry.

(2) A lot consisting of no more than two pet birds per family which originated in the United States and have not been outside the country for more than 60 days may be offered for entry under the provisions of § 92.2(c)(1): *Provided*, that, such birds are also accompanied by a United States veterinary health certificate issued prior to the departure of the birds from the United States and the certificate shows the leg band or tattoo number affixed to the birds prior to departure, and *Provided further*, That during port of entry veterinary inspection, it is determined that the leg band or tattoo on the bird is the same as the one listed on the health certificate. Lots of pet birds of United States origin which have been outside the United States for more than 60 days or which do not otherwise meet the requirements of paragraphs (c)(1) or (c)(2) of this section may be offered for entry under the provisions of paragraph (c)(3) of this section.

(3) A lot consisting of no more than two pet birds which are not known to be affected with or exposed to communicable diseases of poultry may be offered for entry at one of the ports of entry designated in § 92.3(e) under the following conditions:

(i) No more than two such birds per family per year are offered for entry under this pet bird exception.

(ii) The pet birds shall be accompanied by a veterinary health certificate issued by a national government veterinary officer of the country of export stating that he personally inspected the birds listed on the health certificate and found them to be free of evidence of Newcastle disease, ornithosis, and other communicable diseases of poultry, and that the birds were being exported in compliance with the laws and regulations of the country of export. Certificates in a foreign language must be translated into English at the expense of the importer.

(iii) An advanced reservation fee as required by § 92.4(a)(4) and a request for space which has been confirmed in writing, at a USDA-operated quarantine facility shall be made with the port veterinarian [3] at the port where the birds are to be held for a minimum 30-day isolation in a biological secure unit separate and apart from all other avian species, except, that birds arriving without an advanced reservation may be handled if an isolation unit is available, provided the reservation fee as required in § 92.4(a)(4) is paid.

Pet birds offered for entry at a port of entry that has not been designated as provided, in § 92.3, or pet birds arriving without an advanced reservation at a port of entry designated in § 92.3 but at which isolation units are not available, shall be refused entry at such port. However, such pet birds may be transported at the owner's expense to another port of entry designated in § 92.3 if available quarantine space exists, if the $40 reservation fee is paid by the importer and the birds shipped are to such other port under conditions deemed sufficient by the Deputy Administrator to prevent the spread of communicable diseases of poultry.

(iv) During the isolation period, the birds shall be subjected to such tests and procedures as required by the Deputy Administrator to determine whether the birds are free from communicable diseases of poultry.

(v) Following the isolation period, if the birds are found to be free of communicable disease of poultry, the port veterinarian shall issue an agriculture release for entry through U.S. Customs. If the birds are found during port of entry inspection or during quarantine to be infected with or exposed to a communicable disease of poultry, such birds shall be refused entry and handled in accordance with § 92.11(e) of this part.

(vi) The owner of the birds is responsible for all costs which result from these procedures and shall reimburse Veterinary Services for governmental expenses in accordance with § 92.12(b) and (c) of this part.

* * * * *

3. In § 92.3, paragraphs (e) and (f) would be relettered (f) and (g) respectively, and a new paragraph (e) would be added to read:

§ 92.3 Ports designated for the importation of animals.

* * * * *

(e) *Special ports for pet birds.* New York, New York; Miami, Florida; Brownsville, Laredo, and El Paso, Texas; Nogales, Arizona; San Ysidro and Los Angeles, California; and Honolulu, Hawaii, are designated as ports of entry for pet birds imported under the provisions of § 92.2(c)(3).

4. In § 92.4, the section heading, the first sentence of paragraph (a)(1), that portion of paragraph (a)(3) preceding the colon, the first sentence of paragraph (a)(4), and the third and fourth sentences of paragraph (b) would be amended to read:

§ 92.4 Import permits for ruminants, swine, horses from countries affected with CEM, poultry, poultry semen, animal semen, birds, and for animal specimens for diagnostic purposes, [5] and special permits for cattle entering Harry S. Truman Animal Import Center.

(a) *Application for permit; reservation required.* (1) For ruminants, swine, horses from countries listed in § 92.2(i)(1) of the regulations, poultry, poultry semen, animal semen, pet birds, commercial birds, research birds, zoological birds, and performing or theatrical birds and animal test specimens for diagnostic screening purposes, intended for importation from any part of the world, except as otherwise provided for in §§ 92.2(b) and (c), 92.19, 92.27, and 92.31, the importer shall first apply for and obtain from Veterinary Services an import permit. * * *

* * * * *

(3) An application for permit to import ruminants, swine, horses from countries listed in § 92.2(i)(1) of the regulations, poultry, poultry semen, animal semen, pet birds, commercial birds, research birds, zoological birds, and performing or theatrical birds, may also be denied because of: * * *

* * * * *

(4) For each lot of poultry or birds which are to be quarantined in facilities maintained by Veterinary Services, a reservation fee of $40 shall be paid by the importer or his agent at the time the permit or reservation for quarantine space is applied for. * * *

(b) *Permit.* * * * Animals and animal semen and animal test specimens for diagnostic screening purposes for animals intended for importation into the United States for which a permit has been issued, will be received at the specified port of entry within the time prescribed in the permit which shall not exceed 14 days from the first day that the permit is effective for all permits, except that the time prescribed in permits for the importation of pet birds, commercial birds, zoological birds, poultry, or research birds, shall not exceed 30 days, and for performing or theatrical birds or poultry shall not exceed 90 days.

Ruminants, swine, horses from countries listed in § 92.2(i)(1) of the regulations, poultry, poultry semen, animal semen, animal test specimens, and birds for which a permit is required by these regulations will not be eligible for entry if a permit has not been issued; if unaccompanied by such a permit; if shipment is from any port other then the one designated in the permit; if arrival in the United States is at any port other than the one des-

[3] The names and addresses of the port veterinarians, as well as a fee schedule for quarantine charges, are available from the Deputy Administrator, Veterinary Services, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Hyattsville, Maryland 20782.

ignated in the permit; if the amimals (including poultry and birds) or animal semen, or animal test specimens offered for entry differ from those described in the permit; if the animals or animal semen, or animal test specimens are not handled as outlined in the application for the permit and as specified in the permit issued; or in the case of ruminants and swine, if ruminants or swine other than those covered by import permits are aboard the transporting carrier.

* * * * *

§ 92.5 [Amended]

5. In § 92.5, the section heading would be amended to insert, "pet birds," between poultry and commercial birds, and the first sentence of paragraph (c) would be amended to add "pet birds, except as provided for in paragraphs 92.2 (b) and (c)", between the words All and commercial.

6. In § 92.8, a new paragraph (c) would be added to read:

§ 92.8 Inspection at the port of entry.

* * * * *

(c) All pet birds imported from any part of the world, except pet birds from Canada and pet birds meeting the provisions of § 92.2(c)(2), shall be subjected to inspection at the Customs port of entry by a veterinary inspector of Veterinary Services and such birds shall be permitted entry only at the ports listed in § 92.3(e). Pet birds of Canadian origin and those birds meeting the provisions of § 92.2(c)(2) shall be subject to veterinary inspection at any of the ports of entry listed in § 92.3.

§ 92.11 [Amended]

7. In § 92.11, in paragraph (e) the phrase "pet birds, except as provided in § 92.2(c)," would be inserted before the words "commercial birds,".

All written submissions made pursuant to this notice will be made available for public inspection at the Federal Building, Room 821, 6505 Belcrest Road, Hyattsville, Maryland during regular hours of business (8:00 a.m. to 4:30 p.m., Monday to Friday, except holidays) in a manner convenient to the public business (7 CFR 1.27(b)).

Comments submitted should bear a reference to the date and page number of this issue in the FEDERAL REGISTER.

Done at Washington, D.C., this 28th day of December 1978.

NOTE.—This proposal has been reviewed under the USDA criteria established to implement E.O. 12044, "Improving Government Regulations." While this action has not been designated "significant" under those criteria, an approved Draft Impact Analysis Statement has been prepared and is available from the Program Services Staff, Room 870, Federal Building, 6505 Belcrest Road, Hyattsville, Maryland 20782. 301-436-8695.

M. T. GOFF,
Acting Deputy Administrator,
Veterinary Services.

[FR Doc. 79-286 Filed 1-4-79; 8:45 am]

Federal Register

FRIDAY, JANUARY 5, 1979
PART V

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

■

HORSE PROTECTION REGULATIONS

Definition of Terms and Certification and Licensing of Designated Qualified Persons

[3410-34-M]

Title 9—Animals and Animal Products

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 11—HORSE PROTECTION

Definition of Terms and Certification and Licensing of Designated Qualified Persons

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final Rule.

SUMMARY: The Horse Protection Act of 1970 was amended on July 13, 1976. Pursuant to the amended Act, this document amends the "Definitions" section of the regulations promulgated under the Act of 1970, and adds a new section to the regulations entitled "Certification and Licensing of Designated Qualified Persons (DQP's)." Additional amendments to the regulations will be published in the very near future. This partial amendment is being published while the balance of the new regulations are still being prepared so that the regulated industry may have sufficient time to prepare for the next show season which starts in February 1979.

DATE: Effective date January 5, 1979.

FOR FURTHER INFORMATION CONTACT:

Dr. Dale F. Schwindaman, Senior Staff Veterinarian, Animal Care Staff, Veterinary Services, Animal and Plant Health Inspection Service, United States Department of Agriculture, Room 703, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8271.

SUPPLEMENTARY INFORMATION: On April 28, 1978, this Department published a notice of proposed rulemaking containing changes and additions to Part 11 of Subchapter A, Chapter I, Title 9 of the Code of Federal Regulations (43 FR 18514-18531). The proposed rulemaking included, among other things, provisions that: (1) certain prohibitions be established concerning the sale of horses at horse sales or auctions in addition to current prohibitions concerning the showing and exhibiting of horses; (2) procedures be established for the detention and inspection of horses; (3) procedures and requirements be established for Designated Qualified Persons (DQP's) to inspect horses for compliance with the Act; (4) procedures be established for the certification of horse industry DQP programs; and (5) requirements be established regarding space and facilities for inspection of horses required to be supplied by management of horse shows or exhibitions and horse sales or auctions. Proposals for new and revised definitions and other pertinent revisions relative to recordkeeping and other requirements also appeared in the notice of proposed rulemaking.

A total of 47 comments were received within the comment period in response to the proposed rulemaking. Although this is a relatively small number, many of the comments were from horse industry organizations and associations which represent several million individual members and constitutent organizations such as the American Horse Council, the United Professional Horseman's Association, Inc., the American Quarter Horse Association, the American Paint Horse Association, the American Horse Shows Association, Inc., the Appaloosa Horse Club, Inc., the American Saddle Horse Breeders Association, the Tri-State Horsemen's Association, Inc., the Tennessee Walking Horse National Celebration, the Tennessee Walking Horse Breeders and Exhibitors Association, the Walking Horse Owners of America Association, and the Walking Horse Trainers Association, Inc.

Comments were also received from private citizens, Department employees, and from humane agencies, such as the Humane Society of the United States, the Society for Animal Protective Legislation, and the American Horse Protection Association, Inc.

Many of the comments raised questions or made suggestions which, because of their validity, warranted some changes of the proposed standards. Certain editorial changes were also made for purposes of clarification. Because of the lengthy amount of time that will be required to incorporate suggested changes and comments into the proposed regulations for final rulemaking, the Department has decided to publish Sections 11.1 and 11.7 of the proposed regulations ("Definitions" and "Certification and Licensing of Designated Qualified Persons (DQP's)") as final rulemaking at this time. The remaining parts of the proposed regulations will be published as final rulemaking at a later date. The decision to publish Sections 11.1 and 11.7 as final rulemaking at this time was made so that the horse industry organizations and associations concerned would have sufficient time to study the requirements and to establish their DQP programs in time for the next horse show season. If final rulemaking were delayed until all comments received were considered, it is very likely that there would be insufficient time in which to establish such programs for certification by the Department before the next horse show season begins in February 1979.

Discussion of Comments

DEFINITIONS

The proposed rulemaking contained a definition for the "Area Veterinarian in Charge," which is specifically limited to a veterinarian assigned to supervise Veterinary Services programs in a specific State or States which have been designated as an "Area." In order to create greater flexibility in the event of possible future redesignations and changes within the Veterinary Services organization, the Department has decided to eliminate the word "Area" from the definition and to define the term "Veterinarian in Charge" instead (see § 11.1(g)).

Several comments were critical of the definition of "Horse Show" and "Horse Exhibition" for excepting such events as rodeos, parades, trail rides and races, or similar events, where speed is the prime factor. The intent of the Department in defining these terms was to separate those events where the primary purpose is to show or exhibit a horse or horses from those events where speed and endurance of a horse over a measured distance is the primary purpose. Furthermore, the Department finds that any practice which alters the gait of a horse for the purposes of enhancing its ability to compete in a show or exhibition would have the opposite effect in events where speed and endurance determines the winner. Therefore, the Department finds no basis to include rodeos, parades, trail rides, or races in § 11.1(m) or § 11.1(n).

The American Horse Council suggested that the use of the term "animated gaits" be included to restrict the kind of horses affected by the definition of "Horse," "Horse Show," "Horse Exhibition," "Horse Sale," or "Horse Auction." Since the proposed regulations did not include a definition for "animated gaits," the Department is of the opinion that the inclusion of such a restrictive term in this final rulemaking without having first given all interested persons an opportunity to comment would not satisfy the intent or the provisions of Administrative Procedure Act regarding public participation in rulemaking. The Department believes that the inclusion of the term "animated gaits" in the definitions would be of such significance to the kinds and numbers of persons affected and regulated that it would be necessary to publish such inclusion as a proposal in order to elicit responses and comments prior to final rulemaking. The Department also needs additional time to evaluate this suggestion. Therefore, the possible incorporation of the term "animated gaits" in the regulations is being taken

under consideration by the Department and may be incorporated in future rulemaking.

The Department proposed a definition for "Action Device," to mean "any boot, collar, chain, roller, or other device which encircles or is placed upon the lower extremity of the leg of a horse." Several comments criticized this definition since it could include fixed protective devices such as heel boots, skid or sliding boots, hinged quarter boots, and other similar fixed devices. The Department recognizes the validity of such comments, since devices which are fixed are not considered capable of a rotating or sliding action resulting in friction or impact on the hoof, coronet band, or pastern area of the horse. Therefore, a qualifying statement regarding fixed protective devices has been included in the definition of "Action Device."

Several comments expressed concern that Department employees, during the procedure of inspecting horses at horse shows or exhibitions and horse sales or auctions, would be authorized to require the removal of shoes and pads from horses and cited the possible problems associated with the removal of the shoes and pads and the subsequent required reshoeing. The Department would point out that the authority to require the removal of shoes, pads, or any other equipment has been a part of the Horse Protection regulations since their inception and that Department employees have utilized this authority with discretion and for good reasons. The Department believes that there will continue to be situations wherein removal of shoes and pads will be the most appropriate inspection method to determine if a horse is sore. Therefore, the reference to removal of shoes and pads found in the definition of the term "Inspection" will remain. The comments further indicated that the Department should allow the owner or custodian of the horse, which is to have its shoes and pads removed, to select the person who removes such shoes and pads. Other comments also indicated a need to have an 8-hour holding period following the determination to remove shoes and pads before actual removal could be initiated. Long delays, intended or unintended, could result if the horse's owner or custodian demanded that the services of a person located miles away be utilized to perform the required removal of shoes, pads, and other equipment. The Department believes that persons who are qualified to perform the removal of shoes and pads are readily available during horse shows or exhibitions and horse sales or auctions. Therefore, the Department will not incorporate language in the regulations concerning the selection of persons who are to remove shoes or pads. The Department also finds no basis to delay the removal of shoes, pads, or other equipment from a horse for 8 hours before an inspection can be completed since the purpose of the inspection is to determine if a horse is sore at a point in time relative to either its impending exhibition or sale or to its having completed exhibition or sale. It is determined that such delays would place undue restrictions on the Department's inspection procedures which could be used to vitiate the purpose of the Horse Protection Act, and are therefore not warranted.

One horse industry association indicated that the Department should pay for the removal of shoes, pads, and other equipment which Department inspectors may require to be removed and should pay for the replacement of such equipment. This cannot be done since the Department finds that the law makes no specific provision for the government to bear the expense incurred by any owner when presenting an animal to Department personnel for inspection to determine compliance with the requirements of the law.

The Department proposed that the definition for "Sponsoring Organization" shall mean "any person under whose auspices a horse show, horse exhibition, horse sale or horse auction is conducted." Several comments indicated that the proposed definition is vague and too broad in its scope, particularly since it could include horse industry organizations or associations which affiliate with certain horse shows and exhibitions or horse sales and auctions. In order to clarify this definition, and to limit it in its scope, the Department is redefining "Sponsoring Organization" to mean any person under whose immediate auspices and responsibility a horse show, horse exhibition, horse sale or horse auction is conducted.

Some comments expressed concern over the all-encompassing definition of the term "Exhibitor." There was particular concern over the possible legal liabilities of parties involved in lease-purchase agreements. The Department feels that such definition is necessary to properly identify the responsible parties involved in the showing or selling of a horse.

Several of the comments also objected to the use of the wording "* * *" to inspect horses to detect and diagnose soring * * *," in proposed §§ 11.1(v) and 11.7(a), with reference to DQP's who are not Doctors of Veterinary Medicine and should, therefore, not be medically qualified to diagnose a sore horse. However, it is the Department's opinion that a non-veterinarian DQP who is properly certified in accordance with § 11.7 of the regulations should be fully qualified to detect and determine whether a horse is sore, as that term is defined by the Act. As for the particular language of the proposed regulations which was objected to, it was taken directly from the Act.

As proposed, the definition of "Horse Industry Organization or Association" means an organized group of people engaged in any way with the showing, exhibiting, sale, auction, registry, or promotion of horses. One comment criticized this proposed definition as vague and nonspecific in its meaning. One common dictionary definition of association is "an organization of people with a common purpose and having a formal structure." The Department meant to cover this type of organization when promulgating the regulations. Therefore, for the sake of clarity, the term "formal structure" will be added to the proposed definition, and the resulting meaning of "Horse Industry Organization or Association" should be sufficient for the purposes of these regulations.

Horse industry representatives were critical of the proposed definitions of "Lubricant" which restricts the substances that are indicated as lubricants, i.e., "mineral oil, glycerine or petrolatum, or mixtures exclusively thereof." These industry representatives desired that the definition of the term "lubricant" be expanded to include other lubricating substances as well as therapeutic agents or cosmetic grooming aids. It is recognized however, that dyes and other grooming aids would aid in camouflaging signs of scarring or even soring. These substances, as well as lubricants, can act as vehicles for soring agents. The Department is thus limiting the permitted kinds of lubricating agents to those which are clear and transparent; are relatively inexpensive, and readily available; and are controlled by management. Such limitations provide a fair and equitable method for the use of lubricants by all entries in a horse show or exhibition and horse sale or auction. To allow additional substances to be used for lubricating purposes would create problems of control and would consequently enhance the opportunity for unscrupulous persons to utilize soring chemicals. However, the Department has provided in the proposed regulations that other chemicals or substances may be applied, injected, or otherwise used in the therapeutic treatment of a horse by or under the supervisions of a person licensed to practice veterinary medicine in the State in which such treatment is administered.

With respect to the definition of "sore" when used to describe a horse, there were several comments objecting to the term "can reasonably be expected to suffer, physical pain or distress, inflamation, or lameness when walk-

ing, trotting, or otherwise moving" as being vague. Further, one comment desired to delete the word "trotting" from the definition of "sore." The Department has adopted the language used in the Horse Protection Act Amendments of 1976 to define "sore" when used to describe a horse and is of the opinion that, within the context of its usage in the regulations, the term is sufficiently clear so as to be understandable and enforceable.

DESIGNATED QUALIFED PERSONS

Section 4 of the Horse Protection Act as amended (15 U.S.C. 1823) states that the Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing the Act. The intent of Congress and the purpose of this provision is to encourage horse industry self-regulatory activity and to allow the management of any horse show, horse exhibition, horse sale, or horse auction to have the benefit of certain limits upon its liability under the Act if it employs any such qualified persons, hereinafter referred to as designated qualified persons or DQP's, to detect and diagnose soring and to otherwise inspect horses for the purpose of enforcing the Act.

Many of the comments received objected to the DQP's being appointed by the management of horse shows, horse exhibitions, horse sales, and horse auctions, and stated that such DQP's should be appointed by the licensing organization or association. This appears to be a reasonable and sensible suggestion. However, Section 4(c) of the Act states that, "The Secretary shall prescribe by regulation requirements for the appointment *by the management* * * *." The Department must therefore abide by the wording of the Act. Such wording does not prevent any licensing organization or association from establishing a policy of appointing DQP's when the services of such DQP's are requested by the management of any horse show, horse exhibition, horse sale, or horse auction. The Department anticipates that horse industry organizations or associations with a certified DQP program may initiate such a policy under these regulations.

One comment indicated that the status of Doctors of Veterinary Medicine who wish to become licensed DQP's was not clear in the proposed regulations, especially in the area of licensing and accountability. Clarification has been made in this regard. Doctors of Veterinary Medicine who meet the qualifying criteria will be exempted from the formal training requirements indicated in § 11.7(b), but will still be licensed through, and responsible to, a licensing horse industry organization or association.

Several other comments indicated that the proposed DQP requirements were not adequate to assure that an applicant for a DQP appointment was sufficiently experienced in horses and horsemanship. It should be pointed out that the proposed regulations, as well as this final rulemaking, contain a provision which requires that an association's or organization's formal request for DQP program certification, which must be submitted to the Department, must contain, among other things, the criteria to be used to select DQP candidates. This leaves to the Department the final decision regarding the adequacy of such criteria and should constitute an adequate safeguard regarding athe ability of applicants for DQP programs.

Concern about the proposed training period for DQP's was expressed in such comments as, "the training was too long"; "the training was too short"; "the training requirements were vague and should be more specific"; "too much leeway is allowed for the individual qualifying programs"; "training should be limited to one day"; and "training time should be doubled." The Department is of the opinion that all of these comments have some merit. However, establishing a uniform program with minimum requirements and sufficient flexibility, so as to not be overly restrictive, remains the basic problem. The Department has, therefore, left the proposed training requirements essentially intact, but has added two additional requirements. These are 1 hour of classroom instruction on recordkeeping and reporting requirements and procedures, and the requirement that a DQP applicant must satisfactorily work two horse shows, exhibitions, sales or auctions, as an apprentice, before being licensed as a DQP. A change has also been made in the continuing education requirement for DQP's (§ 11.7(b)(5)) to require that such program shall consist of not less than 4 hours of instruction per year.

Three comments suggested that the DQP program should be operated by the Department and the applicants should by trained and licensed directly by the Department. The Department has neither the personnel nor the funds to carry out such an extensive undertaking and feels that the DQP program should remain in the realm of industry self-regulation.

Another comment suggested that licensed DQP's should not be limited to working for one association or organization, but should be able to be approved by any authorizing organization they desire. Nothing in the proposed or final regulations prevents this type of operation or cooperation by licensing organizations or associations. The Department is of the opinion that this is logical and desirable, but will leave the responsibility for such operation and cooperation to the licensing organizations and associations.

Four of the comments were opposed to the entire concept of DQP's and stated that the program was unworkable, unnecessary, expensive, and should be dropped. Section 4 of the Act directs the Secretary to establish regulations and requirements for the appointment of persons qualified to inspect horses for soring. Without a program to assure that such persons are in fact qualified to perform this function, the intent and purpose of the Act would not be satisfied. Additionally, the Department believes that the establishment and proper operation of a DQP program will be a valuable tool to the horse industry in its self-regulating efforts to stop soring.

Two comments received were concerned with the performance and conduct of DQP's and the methods of removing DQP's who do not properly carry out their duties and functions. The Department feels that methods of monitoring supervision, and disciplinary procedures are primarily the responsibility of the licensing organizations or associations and should be properly established and maintained by them. Should the licensing organization or association fail to establish or properly carry out such monitoring, supervision, or disciplinary procedures, the Department may revoke certification of the DQP program of that organization or association. Such revocation will also result in the expiration of the DQP license issued under the program unless they are transferred to another program which is certified. Furthermore, the Act makes provision for disqualification by the Secretary, after notice and opportunity for a hearing, of persons to make detection, diagnosis, or inspection for compliance with the Act. The Act also provides that any person who is so disqualified shall be prohibited, by regulation, from being appointed to make such detection, diagnosis, or inspection.

Six comments received from the Walking Horse industry objected to the wording used in § 11.7(d)(vii) which required, "A detailed description of all the DQP's findings and the nature or other reason for disqualifying or excusing or recommending the horse be excused or disqualified, including said DQP's opinion as to what caused the condition upon which the decision to disqualify or excuse or recommend disqualifying or excusing said horse was based." The comments indicated that most DQP's would be "lay

persons" and not veterinarians and, therefore, could not give valid opinions as to what caused the condition which resulted in disqualification of the horse. Further concern was that such wording would make the DQP an agent of the Department and result in the DQP's being used to testify against members of the organization or association which he represents. The Act authorizes the Secretary to subpoena the attendance and testimony of witnesses regarding violations of the Act or regulations. Therefore, at proceedings regarding violations of the Act or regulations, such DQP's could be required to testify with regard to their inspections. For the sake of clarity, the wording of § 11.7(d)(1)(vii) is changed to read "A detailed description of all of the DQP's findings and the nature of the alleged violation, or other reason for disqualifying or excusing the horse, including said DQP's statement regarding the evidence or facts upon which the decision to disqualify or excuse said horse was based."

Three of the comments received indicated that the recordkeeping and reporting requirements of proposed § 11.7(d)(1)(ix) required a dual reporting procedure, whereby the DQP must submit identical information to the Department and to the licensing organization or association, which then must submit the same information to the Department on a monthly basis. The Department agrees that such a dual reporting system appears to be unnecessary and burdensome at this time. Therefore, § 11.7(d)(1)(ix) is changed to require the DQP to report the required information to the licensing organization or association only, which will then transmit this information to the Department on a monthly basis.

One comment received stated that the Department should not allow the licensing as a DQP, of anyone that has been convicted of any violation of the Act, or assessed any civil penalty, since the Horse Protection Act was originally passed in 1970. The Department can understand and sympathize with such feelings. However, the Department, also believes that people do not remain static, but change due to their experiences and changing circumstances. To deny these people the opportunity to become a licensed DQP because of a past mistake, would not only be unwarranted, but would be vindictive. It would also deprive the industry of the services of some very valuable people. For this reason, the Department will not penalize those persons found in violation of the Act of 1970. However, persons found in violation of the Act, as amended in 1976, should, in the Department's opinion, be treated differently. This is reflected in § 11.7(c)(4) of these regulations wherein such persons shall not be allowed to be licensed as DQP's for a period of at least 2 years following the first violation, and for a period of at least 5 years following the second violation, or any subsequent violation.

One comment received suggested that DQP's should be prohibited from inspecting any shows or sales which involve any animals owned or exhibited by their family or employers, or any horse that they have trained. The Department concurs in part with this suggestion in regard to family members and employers, but feels that to include horses that may have been trained by such DQP's would not only be unduly restrictive, but would be impossible to enforce. Therefore, the Department has added to § 11.7(d)(7) a statement that DQP's may not inspect any horse show, exhibition, sale or auction in which a horse owned by a member of his family or his employer are in competition, or are being sold.

The majority of the comments objected to requiring the use of DQP's at all types of shows or sales and for all breeds of horses, and indicated that DQP's should be used only for those shows or sales which include Tennessee Walking Horses, the breed which is customarily sored. The Horse Protection Act applies to all breeds of horses and to all types of horse shows, exhibitions, sales and auctions, and the Department has the authority to inspect any horse at any horse show, exhibition, sale or auction. The Department has inspected many breeds of horses and many types of shows and sales in the past, and will continue to inspect many types of shows and sales, and many breeds of horses in the future. However, the comments regarding restricting the use of DQP's to those sales and shows involving Tennessee Walking Horses are basically valid. Historically, the Department has found the practices of soring to alter a horse's gait to be limited to Tennessee Walking Horses and to a much lesser extent, racking horses. However, the proposed regulations did not place any restrictions as to the type of horse show or exhibition and horse sale or auction, or the kinds of horses to be inspected by licensed DQP's. Therefore, the Department feels that the inclusion of such restrictions in the final rulemaking without having first given all interested persons an opportunity to comment would not satisfy the intent or the provisions of the Administrative Procedures Act. This is because the inclusion of such restrictions would be of such significance to the kinds and numbers of persons affected and regulated as to be cause for publication as a proposal in order to elicit responses and comments from the public before promulgating final rulemaking. The Department will therefore take the comments under consideration with the possibility of incorporating them into the regulations at a later date.

Accordingly, Part 11 of Subchapter A, Chapter I, Title 9 of the Code of Federal Regulations, is amended in the following respects:

1. The Table of Contents cited in Part 11—Horse Protection Regulations is amended to read as follows:

PART 11—HORSE PROTECTION REGULATIONS

Sec.
11.1 Definitions.
11.2 Prohibitions concerning exhibitors.
11.3 Scar rule.
11.4 Inspection and detention of horses.
11.5 Access to premises and records.
11.6 Inspection space and facility requirements.
11.7 Certification and licensing of designated qualified persons (DQP's).
11.20 Responsibilities and liabilities of managment.
11.21 Records required, and disposition thereof.
11.22 Inspection of records.
11.24 Reporting by management.
11.40 Prohibitions and requirements concerning persons involved in transportation of certain horses.
11.41 Reporting required of horse industry organizations and associations.

2. § 11.1 (9 CFR 11.1) is amended to read as follows:

§ 11.1 Definitions.

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected by definition in a standard dictionary, such as "Webster's."

(a) "Act" means the Horse Protection Act of 1970 (Public Law 91-540) as amended by the Horse Protection Act Amendments of 1976 (Public Law 94-360), 15 U.S.C. 1821 *et seq.*, and any legislation amendatory thereof.

(b) "Department" means the United States Department of Agriculture.

(c) "Secretary" means the Secretary of Agriculture or anyone who has heretofore or may hereafter be delegated authority to act in his stead.

(d) "Administrator" means the Administrator of the Animal and Plant Health Inspection Service or any other official of the Department to whom authority has heretofore been delegated or to whom authority may hereafter be delegated to act in his stead.

(e) "Deputy Administrator" means the Deputy Administrator for Veterinary Services or any other official of

Veterinary Services to whom authority has heretofore been delegated or to whom authority may hereafter be delegated, to act in his stead.

(f) "Veterinary Services" means the office of the Animal and Plant Health Inspection Service to which responsibility is assigned for the administration of the Act.

(g) "Veterinarian in Charge" means the Veterinary Services veterinarian who is assigned by the Deputy Administrator to supervise and perform official duties of Veterinary Services under the Act in a specified State or States.[1]

(h) "Veterinary Services Show Veterinarian" means the Veterinary Services Doctor of Veterinary Medicine, responsible for the immediate supervision and conduct of the Department's activities under the Act at any horse show, horse exhibition, horse sale or horse auction.

(i) "Veterinary Services representative" means any employee of Veterinary Services, or any officer or employee of any State agency who is authorized by the Deputy Administrator to perform inspections or any other functions authorized by the Act, including the inspection of the records of any horse show, horse exhibition, horse sale or horse auction.

(j) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Trust Territory of the Pacific Islands.

(k) "Person" means any individual, corporation, company, association, firm, partnership, society, organization, joint stock company, or other legal entity.

(l) "Horse" means any member of the species *Equus caballus.*

(m) "'Horse Show" means a public display of any horses, in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides.

(n) "Horse Exhibition" means a public display of any horses, singly or in groups, but not in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides.

(o) "Horse Sale or Horse Auction" means any event, public or private, at which horses are sold or auctioned, regardless of whether or not said horses are exhibited prior to or during the sale or auction.

(p) "Action Device" means any boot, collar, chain, roller, or other device which encircles or is placed upon the lower extremity of the leg of a horse in such a manner that it can either rotate around the leg, or slide up and down the leg so as to cause friction, or which can strike the hoof, coronet band or fetlock joint.

(q) "Inspection" means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.

(r) "Sponsoring Organization" means any person under whose immediate auspices and responsibility a horse show, horse exhibition, horse sale, or horse auction is conducted.

(s) "Show Manager" means the person who has been delegated primary authority by a sponsoring organization for managing a horse show, horse exhibition, horse sale or horse auction.

(t) "Management" means any person or persons who organize, exercise control over, or administer or are responsible for organizing, directing, or administering any horse show, horse exhibition, horse sale or horse auction and specifically includes, but is not limited to, the sponsoring organization and show manager.

(u) "Exhibitor" means (1) any person who enters any horse, any person who allows his horse to be entered, or any person who directs or allows any horse in his custody or under his direction, control or supervision to be entered in any horse show or horse exhibition; (2) any person who shows or exhibits any horse, any person who allows his horse to be shown or exhibited, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be shown or exhibited in any horse show or horse exhibition; (3) any person who enters or presents any horse for sale or auction, any person who allows his horse to be entered or presented for sale or auction, or any person who allows any horse in his custody or under his direction, control, or supervision to be entered or presented for sale or auction in any horse sale or horse auction; or (4) any person who sells or auctions any horse, any person who allows his horse to be sold or auctioned, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be sold or auctioned.

(v) "Designated Qualified Person" or "DQP" means a person meeting the requirements specified in § 11.7 of this part who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the Department and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale or horse auction under Section 4 of the Act to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of enforcing the Act.

(w) "Horse Industry Organization or Association" means an organized group of people, having a formal structure, who are engaged in the promotion of horses through the showing, exhibiting, sale, auction, registry, or any activity which contributes to the advancement of the horse.

(x) "Lubricant" means mineral oil, glycerine or petrolatum, or mixtures exclusively thereof, that is applied to the limbs of a horse solely for protective and lubricating purposes while the horse is being shown or exhibited at a horse show, horse exhibition, horse sale or horse auction.

(y) "Sore" when used to describe a horse means:

(1) an irritating or blistering agent has been applied, internally or externally by a person to any limb of a horse,

(2) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(3) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(4) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

3. The heading for § 11.2 will remain unchanged.

4. A new heading for § 11.3 (9 CFR 11.3) is added to read as follows:

§ 11.3 Scar rule.

5. The heading of § 11.4 (9 CFR 11.4) is amended to read as follows:

[1] Information as to the name and address of the Veterinarian in Charge for the State or States concerned can be obtained by writing to the Deputy Administrator, Veterinary Services, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Hyattsville, MD 20782.

§ 11.4 Inspection and detention of horses.

6. The heading of § 11.5 (9 CFR 11.5) is amended to read as follows:

§ 11.5 Access to premises and records.

7. A new heading for § 11.6 (9 CFR 11.6) is added to read as follows:

§ 11.6 Inspection space and facility requirements.

8. A new § 11.7 (9 CFR 11.7) is added to read as follows:

§ 11.7 Certification and licensing of designated qualified persons (DQP's).

(a) *Basic qualifications of DQP applicants.* DQP's holding a valid, current DQP license issued in accordance with this Part may be appointed by the management of any horse show, horse exhibition, horse sale, or horse auction, as qualified persons in accordance with section 4(c) of the Act, to inspect horses to detect or diagnose soring and to otherwise inspect horses, or any records pertaining to any horse for the purpose of enforcing the Act. Individuals who may be licensed as DQP's under this part shall be:

(1) Doctors of Veterinary Medicine who are accredited in any State by the United States Department of Agriculture under Part 161 of Chapter I, Title 9 of the Code of Federal Regulations, and who are:

(i) members of the American Association of Equine Practitioners, or

(ii) large animal practitioners with substantial equine experience, or

(iii) knowledgeable in the area of equine lameness as related to soring and soring practices (such as Doctors of Veterinary Medicine with a small animal practice who own, train, judge, or show horses, or Doctors of Veterinary Medicine who teach equine related subjects in an accredited college or school of veterinary medicine). Accredited Doctors of Veterinary Medicine who meet these criteria may be licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department under this part without undergoing the formal training requirements set forth in this section.

(2) Farriers, horse trainers, and other knowledgeable horsemen whose past experience and training would qualify them for positions as horse industry organization or association stewards or judges (or their equivalent) and who have been formally trained and licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department in accordance with this section.

(b) *Certification requirements for DQP programs.* The Department will not license DQP's on an individual basis. Licensing of DQP's will be accomplished only through DQP programs certified by the Department and initiated and maintained by horse industry organizations or associations. Any horse industry organization or association desiring Department certification to train and license DQP's under the Act shall submit to the Deputy Administrator[2] a formal request in writing for certification of its DQP program and a detailed outline of such program for Department approval. Such outline shall include the organizational structure of such organization or association and the names of the officers or persons charged with the management of the organization or association. The outline shall also contain at least the following:

(1) The criteria to be used in selecting DQP candidates and the minimum qualifications and knowledge regarding horses each candidate must have in order to be admitted to the program.

(2) A copy of the formal training program, classroom and practical, required to be completed by each DQP candidate before being licensed by such horse industry organization or association, including the minimum number of hours, classroom and practical, and the subject matter of the training program. Such training program must meet the following minimum standards in order to be certified by the Department under the Act.

(i) Two hours of classroom instruction on the anatomy and physiology of the limbs of a horse. The instructor teaching the course must be specified, and a resume of said instructor's background, experience, and qualifications to teach such course shall be provided to the Deputy Administrator.[2]

(ii) Two hours of classroom instruction on the Horse Protection Act and regulations and their interpretation. Instructors for this course must be furnished or recommended by the Department. Requests for instructors to be furnished or recommended must be made to the Deputy Administrator[2] in writing at least 30 days prior to such course.

(iii) Four hours of classroom instruction on the history of soring, the physical examination procedures necessary to detect soring, the detection and diagnosis of soring, and related subjects. The instructor teaching the course must be specified and a summary of said instructor's background, experience, and qualifications to teach such course must be provided to the Deputy Administrator.[2]

(iv) Four hours of practical instruction in clinics and seminars utilizing live horses with actual application of the knowledge gained in the classroom subjects covered in (i), (ii), and (iii). Methods and procedures required to perform a thorough and uniform examination of a horse shall be included. The names of the instructors and a resume of their background, academic and practical experience, and qualifications to present such instruction shall be provided to the Deputy Administrator.[2] Notification of the actual date, time, duration, subject matter, and geographic location of such clinics or seminars must be sent to the Deputy Administrator[2] at least 10 days prior to each such clinic or seminar.

(v) One hour of classroom instruction regarding the DQP standards of conduct promulgated by the licensing organization or association pursuant to paragraph (d)(7) of this section.

(vi) One hour of classroom instruction on recordkeeping and reporting requirements and procedures.

(3) A sample of a written examination which must be passed by DQP candidates for successful completion of the program along with sample answers and the scoring thereof, and proposed passing and failing standards.

(4) The criteria to be used to determine the qualifications and performance abilities of DQP candidates selected for the training program and the criteria used to indicate successful completion of the training program, in addition to the written examination required in paragraph (b)(3) of this section.

(5) The criteria and schedule for a continuing education program and the criteria and methods of monitoring and appraising performance for continued licensing of DQP's by such organization or association. A continuing education program for DQP's shall consist of not less than 4 hours of instruction per year.

(6) The methods to be used to insure uniform interpretation and enforcement of the Horse Protection Act and regulations by DQP's and uniform procedures for inspecting horses for compliance with the Act and regulations; and,

(7) Standards of conduct for DQP's promulgated by the organization or association in accordance with paragraph (d)(7) of this section.

(8) A formal request for Department certification of the DQP program.

The horse industry organizations or associations that have formally requested Department certification of their DQP training, enforcement, and maintenance program will receive a

[2]Deputy Administrator, Veterinary Services, Animal and Plant Health Inspection Service, United States Department of Agriculture, 6505 Belcrest Road, Room 703, Hyattsville, MD 20782.

[2]Deputy Administrator, Veterinary Services, Animal and Plant Health Inspection Service, United States Department of Agriculture, 6505 Belcrest Road, Room 703, Hyattsville, MD 20782.

formal notice of certification from the Department, or the reasons, in writing, why certification of such program cannot be approved. A current list of certified DQP programs and licensed DQP's will be published in the FEDERAL REGISTER at least once each year, and as may be further required for the purpose of deleting programs and names of DQP's that are no longer certified or licensed, and of adding the names of programs and DQP's that have been certified or licensed subsequent to the publication of the previous list.

(c) *Licensing of DQP's.* Each horse industry organization or association receiving Department certification for the training and licensing of DQP's under the Act shall:

(1) Issue each DQP licensed by such horse industry organization or association a numbered identification card bearing the name and personal signature of the DQP, a picture of the DQP, and the name and address, including the street address or post office box and zip code, of the licensing organization or association;

(2) Submit a list to the Deputy Administrator [2] of names and addresses including street address or post office box and zip code, of all DQP's that have successfully completed the certified DQP program and have been licensed under the Act and regulations by such horse industry organization or association;

(3) Notify the Department of any additions or deletions of names of licensed DQP's from the licensed DQP list submitted to the Department or of any change in the address of any licensed DQP or any warnings and license revocations issued to any DQP licensed by such horse industry organization or association within 10 days of such change;

(4) Not license any person as a DQP if such person has been convicted of any violation of the Act or regulations occurring after July 13, 1976, or paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976, for a period of at least 2 years following the first such violation, and for a period of at least 5 years following the second such violation and any subsequent violation;

(5) Not license any person as a DQP until such person has attended and worked two recognized or affiliated horse shows, horse exhibitions, horse sales, or horse auctions as an apprentice DQP and has demonstrated the ability, qualifications, knowledge and integrity required to satisfactorily execute the duties and responsibilities of a DQP;

(6) Not license any person as a DQP if such person has been disqualified by the Secretary from making detection, diagnosis, or inspection for the purpose of enforcing the Act, or if such person's DQP license is canceled by another horse industry organization or association.

(d) *Requirements to be met by DQP's and Licensing Organizations or Associations.* (1) Any licensed DQP appointed by the management of any horse show, horse exhibition, horse sale, or horse auction to inspect horses for the purpose of detecting and determining or diagnosing horses which are sore and to otherwise inspect horses for the purpose of enforcing the Act and regulations, shall keep and maintain the following information and records concerning any horse which said DQP recommends be disqualified or excused for any reason at such horse show, horse exhibition, horse sale, or horse auction, in a uniform format required by the horse industry organization or association that has licensed said DQP:

(i) The name and address, including street address or post office box and zip code, of the show and the show manager.

(ii) The name and address, including street address or post office box and zip code, of the horse owner.

(iii) The name and address, including street address or post office box and zip code, of the horse trainer.

(iv) The name and address, including street address or post office box and zip code, of the horse exhibitor.

(v) The exhibitors number and class number, or the sale or auction tag number of said horse.

(vi) The date and time of the inspection.

(vii) A detailed description of all of the DQP's findings and the nature of the alleged violation, or other reason for disqualifying or excusing the horse, including said DQP's statement regarding the evidence or facts upon which the decision to disqualify or excuse said horse was based.

(viii) The name, age, sex, color, and markings of the horse; and

(ix) The name or names of the show manager or other management representative notified by the DQP that such horse was or should be excused or disqualified and whether or not such manager or management representative excused or disqualified such horse.

Copies of the above records shall be submitted by the involved DQP to the horse industry organization or association that has licensed said DQP within 72 hours after the horse show, horse exhibition, horse sale, or horse auction is over.

(2) The DQP shall inform the custodian of each horse allegedly found in violation of the Act or its regulations, or disqualified or excused for any other reason, of such action and the specific reasons for such action.

(3) Each horse industry organization or association having a Department certified DQP program shall submit a report to the Department containing the following information, from records required in paragraph (d)(1) of this section and other available sources, to the Department on a monthly basis:

(i) The identity of all horse shows, horse exhibitions, horse sales, or horse auctions that have retained the services of DQP's licensed by said organization or association during the month covered by the report. Information concerning the identity of such horse shows, horse exhibitions, horse sales, or horse auctions shall include:

(A) The name and location of the show, exhibition, sale, or auction.

(B) The name and address of the manager.

(C) The date or dates of the show, exhibition, sale, or auction.

(ii) The identity of all horses at each horse show, horse exhibition, horse sale, or horse auction that the licensed DQP recommended be disqualified or excused for any reason. The information concerning the identity of such horses shall include:

(A) The registered name of each horse.

(B) The name and address of the owner, trainer, exhibitor, or other person having custody of or responsibility for the care of each such horse disqualified or excused by the DQP.

(4) Each horse industry organization or association having a Department certified DQP program shall provide, by certified mail if personal service is not possible, to the trainer and owner of each horse allegedly found in violation of the Act or its regulations or otherwise disqualified or excused for any reason by one of said organization or association DQP's at any horse show, horse exhibition, horse sale, or horse auction, the following information;

(i) The name and date of the show, exhibition, sale, or auction.

(ii) The name of the horse and the reason why said horse was excused, disqualified, or alleged to be in violation of the Act or its regulations.

(5) Each horse industry organization or association having a Department certified DQP program shall provide each of its licensed DQP's with a current list of all persons that have been disqualified by order of the Secretary from showing or exhibiting any horse, or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Department will

[2] Deputy Administrator, Veterinary Services, Animal and Plant Health Inspection Service, United States Department of Agriculture, 6505 Belcrest Road, Room 703, Hyatttsville, MD 20782.

make such list available, on a current basis, to organizations and associations maintaining a certified DQP program.

(6) Each horse industry organization or association having a Department certified DQP program shall develop and provide a continuing education program for licensed DQP's which provides not less than 4 hours of instruction per year to each licensed DQP.

(7) Each horse industry organization or association having a Department certified DQP program shall promulgate standards of conduct for its DQP's, and shall provide administrative procedures within the organization or association for initiating, maintaining, and enforcing such standards. The procedures shall include the causes for and methods to be utilized for canceling the license of any DQP who fails to properly and adequately carry out his duties. Minimum standards of conduct for DQP's shall include the following:

(i) A DQP shall not exhibit any horse at any horse show or horse exhibition, or sell, auction, or pruchase any horse sold at a horse sale or horse auction at which he or she has been appointed to inspect horses;

(ii) A DQP shall not inspect horses at any horse show, horse exhibition, horse sale or horse auction in which a horse or horses owned by a member of the DQP's immediate family or the DQP's employer are competing or are being offered for sale;

(iii) A DQP shall follow the uniform inspection procedures of his certified organization or association when inspecting horses; and

(iv) A DQP shall disqualify from competition or sale any horse found in his opinion, to be in violation of the Horse Protection Act or regulations.

(e) *Prohibition of appointment of certain persons to perform duties under the Act.* The management of any horse show, horse exhibition, horse sale, or horse auction shall not appoint any person to detect and diagnose horses which are sore or to otherwise inspect horses for the purpose of enforcing the Act, if that person:

(1) Does not hold a valid, current DQP license issued by a horse industry organization or association having a DQP program certified by the Department.

(2) Has had his DQP license canceled by the licensing organization or association.

(3) Is disqualified by the Secretary from performing diagnosis, detection, and inspection under the Act, after notice and opportunity for a hearing,[3] when the Secretary finds that such person is unfit to perform such diagnosis, detection, or inspection because he has failed to perform his duties in accordance with the Act or regulations, or because he has been convicted of a violation of any provision of the Act or regulations occurring after July 13, 1976, or has paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976.

(f) *Cancellation of DQP license.* Each horse industry organization or association having a DQP program certified by the Department shall issue a written warning to any DQP whom it has licensed who violates the rules, regulations, by-laws, or standards of conduct promulgated by such horse industry organization or association pursuant to this section, or who carries out his duties and responsibilities in a less than satisfactory manner, and shall cancel the license of any DQP after a second violation. Upon cancellation of his DQP license, the DQP may, within 30 days thereafter, request a hearing before a review committee of not less than three persons appointed by the licensing horse industry organization or association. If the review committee sustains the cancellation of the license, the DQP may appeal the decision of such committee to the Deputy Administrator within 30 days from the date of such decision, and the Deputy Administrator shall make a final determination in the matter. If the Deputy Administrator finds, after providing the DQP whose license has been canceled with a notice and an opportunity for a hearing,[3] that there is sufficient cause for the committee's determination regarding license cancellation, he shall issue a decision sustaining such determination. If he does not find that there was sufficient cause to cancel the license, the licensing organization or association shall reinstate the license.

(2) Each horse industry organization or association having a Department certified DQP program shall cancel the license of any DQP licensed under its program who has been convicted of any violation of the Act or regulations or of any DQP who has paid a fine or civil penalty in settlement of any alleged violation of the Act or regulations if such alleged violation occurred after July 13, 1976.

(g) *Revocation of DQP program certification of horse industry organizations or associations.* Any horse industry organization or association having a Department certified DQP program which fails to comply with the requirements contained in this section may have such certification of its DQP program revoked unless, upon written notification from the Department of such failure to comply with the requirements in this section, such organization or association takes immediate action to rectify such failure and takes appropriate steps to prevent a recurrence of such non-compliance within the time period specified in the Department notification, or otherwise adequately explains such failure to comply. Any horse industry organization or association whose DQP program certification has been revoked may appeal such revocation to the Deputy Administrator[3] in writing within 30 days after the date of such revocation and, if requested, shall be afforded an opportunity for a hearing.[3] All DQP licenses issued by a horse industry organization or association whose DQP program certification has been revoked shall expire 30 days after the date of such revocation, or 15 days after the date the revocation becomes final after appeal, unless they are transferred to a horse industry organization or association having a program currently certified by the Department.

9. The heading of § 11.20 (9 CFR 11.20) is amended to read as follows:

§ 11.20 Responsibilities and liabilities of management.

10. The heading for § 11.21 will remain unchanged.

11. The heading for § 11.22 will remain unchanged.

12 § 11.23 (9 CFR 11.23) is deleted.

13. The heading of § 11.24 (9 CFR 11.24) is amended to read as follows:

§ 11.24 Reporting by management.

14. The heading of § 11.40 (9 CFR 11.40) is amended to read as follows:

§ 11.40 Prohibitions and requirements concerning persons involved in transportation of certain horses.

15. The heading of § 11.41 (9 CFR 11.41) is amended to read as follows:

§ 11.41 Reporting required for horse industry organizations or associations.

(Secs. 4, 6, and 9; 84 Stat. 1404; 90 Stat. 916 and 918; (15 U.S.C. 1823, 1825, and 1828); 29 FR 16210, 36 FR 20707.)

It is to the benefit of the public and the regulated industries that these amendments to the regulations be made effective at the earliest practicable date. The changes effected by these regulations will require that horse industry organizations and associations initiate and complete certain programs for Department certification in time for the next horse show season. In view of the foregoing, it is hereby found and determined that good cause exists for making these regulations effective on the date of publication in the FEDERAL REGISTER, and that it would be contrary to the public interest to delay the effective

[3] Hearing would be in accordance with the Uniform Rules of Practice for the Department of Agriculture in Subpart H of Part 1, Subtitle A, Title 7, Code of Federal Regulations (7 CFR 1.130 *et seq.*)

date of these amendments for 30 days after their publication. (Section 553(d), Administrative Procedures Act, 5 U.S.C. 551-559.)

Done at Washington, D.C., this 27th day of December, 1978.

NOTE.—This rule has been reviewed under the USDA criteria established to implement E.O. 12044, "Improving Government Regulations", and has been designated "significant". An approved Final Impact Analysis Statement has been prepared and is available from the Animal Care Staff, Room 703, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, telephone Area Code (301) 436-8271.

M. T. GOFF,
Acting Deputy Administrator,
Veterinary Services.

[FR Doc. 79-287 Filed 1-4-79; 8:45 am]

federal register

FRIDAY, JANUARY 5, 1979
PART VI

DEPARTMENT OF ENERGY

■

FEDERAL LOAN GUARANTEES FOR GEOTHERMAL ENERGY UTILIZATION

Proposed Rulemaking: Public Hearing

[6450-01-M]

DEPARTMENT OF ENERGY

[10 CFR Part 790]

FEDERAL LOAN GUARANTEES FOR GEOTHERMAL ENERGY UTILIZATION

Proposed Rulemaking: Public Hearing

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking and public hearing.

SUMMARY: This proposed regulation revises 10 CFR 790 published on May 26, 1976, to conform with provisions in Title V of the "Department of Energy Act of 1978-Civilian Applications," Pub. L. 95-238 enacted February 25, 1978. Title V contains amendments to the "Geothermal Energy Research, Development, and Demonstration Act of 1974," Pub. L. 93-410, which authorized the establishment of the Geothermal Loan Guaranty Program that had been implemented by the Energy Research and Development Administration (ERDA). On October 1, 1977, the Department of Energy (DOE) pursuant to the Department of Energy Organization Act, Pub. L. 95-91 assumed the functions and the authority of ERDA to execute the Geothermal Loan Guaranty Program. Therefore this proposed regulation implements the transfer to the Secretary of Energy of responsibilities and authorities of ERDA's Administrator pertaining to the Geothermal Loan Guaranty Program. Additionally, this proposed regulation contains other revisions and amendments to the previously published regulations for the Geothermal Loan Guaranty Program that clarify DOE financial policy and remove certain ambiguities identified during the past two years of operating experience. Amendments and revisions to 10 CFR Part 790 are not effective at this time. DOE will accept and process guaranty applications for loans of less than $50,000,000 based on authority contained in Section 508(1) of Pub. L. 95-238 but their approval may be delayed until publication of a modification of the existing regulation which removes the limit specified in Pub. L. 93-410 prior to its amendment by Pub. L. 95-238. Guaranty applications for loans in excess of $50,000,000 will not be accepted until DOE publishes final regulations implementing the Community Impact Assistance provisions authorized in Sec. 205 of Pub. L. 93-410 as amended.

Written comments will be received and public hearings will be held with respect to this proposed rulemaking.

DATES: Written comments must be received on or before March 6, 1979; requests to speak, on or before January 29, 1979; hearing testimony, on or before February 8, 1979; public hearing dates, February 13 and February 21, 1979.

ADDRESSES: Written comments and requests to speak to Department of Energy, Public Hearing Management, Room 2313, Box TX, 2000 M Street, N.W., Washington, D.C. 20461. The hearings will be held on February 13, 1979, at the U.S. Courthouse, Main Post Office Building, 7th and Mission Streets, Courtroom 15, San Francisco, CA, and on February 21, 1979 at the Department of Energy, 2626 West Mockingbird Lane, Dallas, TX.

FOR FURTHER INFORMATION CONTACT:

Lawrence Falick, Department of Energy, Washington, DC 20461 (202) 633-8903.

SUPPLEMENTARY INFORMATION:

I. Background

On May 26, 1976, ERDA published in the Federal Register (41 FR 21433) a final regulation containing policies, filing procedures and other instructions under which lenders may obtain a Federal guaranty on loans to qualified borrowers related to the commercial development of practicable means to produce, with environmentally acceptable processes, useful energy from geothermal resources. That regulation became effective on June 25, 1976 thereby permitting applications for guarantees on loans for geothermal projects to be submitted to ERDA.

This proposed regulation incorporates many of the changes to the Geothermal Loan Guaranty Program contained in Pub. L. 95-238. The amendments to Pub. L. 95-238, in summary, provide: That the full faith and credit of the United States is pledged to the payment of these guarantees; that DOE can borrow funds from the Department of the Treasury if balances in the Geothermal Resources Development Fund are insufficient to enable DOE to carry out its guaranty and other responsibilities; the authority to assist the borrower in making payment on loan principal; that DOE may complete and operate a plant acquired through default; for loan limitations of $50 million per project and of $200 million per qualified borrower; for clarification on the scope of projects utilizing geothermal energy in direct heat processes; a limitation of 1% on a guaranty fee to be imposed annually on the outstanding guaranteed debt and permits fee collection to be deposited in the Geothermal Resources Development Fund; and, that DOE can reimburse to qualified public agencies and Indian tribes a portion of the interest when a holder of their debt guaranteed under this regulation is required to include that income under Chapter 1 of the Internal Revenue Code.

This proposed regulation contains other revisions and amendments to the previously published regulations for the Geothermal Loan Guaranty Program that clarify DOE financial policy and remove certain ambiguities identified during two years of operating experience. Section 790.36 has been revised to clarify provisions dealing with termination, withdrawal and reduction of a guaranty. Section 790.37, "Default and Demand," has been expanded to provide that holders as well as lenders may make demand for payment in the event of default. Section 790.13, "Deviations" has been added to increase flexibility during program execution. Section 790.12 sets forth the conditions under which loans may be placed through the Federal Financing Bank. Section 790.37(g) provides that in certain situations a joint agreement between DOE and the lender may allow for the lender to liquidate project assets. Comments and opinions on these sections are specifically solicited.

Sec. 509 of Pub. L. 95-238 provides the authority for DOE to make interest differential payments to qualified public organizations. This Section contains an ambiguity by referring to "any guaranty which is issued after the enactment of this subsection, by, or in behalf of, any State, political subdivision, or Indian Tribe...". The word "guaranty" has been used instead of the more usual term "obligation" in referring to the note issued by a qualified public organization as evidence of its debt. The proposed regulation implements this provision in Subsection 790.4(d). Parties having a view on this Subpart as an implementation of Section 509 are specifically requested to provide DOE with comments.

II. Comment Procedures

A. Written Comments

Interested persons are invited to submit written comments with respect to the proposed regulations to Department of Energy, Box TX, Public Hearing Management, Room, 2313, 2000 M Street N.W., Washington, D.C. 20461. The outside of the envelope and documents submitted to DOE should be identified with the designation "Federal Loan Guarantees for Geothermal Energy Utilization." Fifteen copies of all written comments and related information should be submitted in time to be received by DOE by March 6, 1979 in order to insure consideration.

Any information or data considered by the person furnishing it to be confidential must be so identified and submitted in writing, one copy only. Any material not accompanied by a state-

ment of confidentiality will be considered to be nonconfidential. DOE reserves the right to determine the confidential status of the information or data and to treat it according to its determination.

B. PUBLIC HEARING

1. *Participation Procedures.* Public hearings on the proposed regulations will be held at 9:30 a.m. on February 13, 1979 at the U.S. Courthouse, Main Post Office Building, 7th and Mission Streets, Courtroom 15, San Francisco, CA, and at 9:30 a.m. on February 21, 1979, at the Department of Energy, 2626 West Mockingbird Lane, Dallas, TX. Any person who has an interest in the proposed regulations or who is a representative of a group or class of persons which has an interest in them may make a written request for an opportunity to make oral presentation. The request should be addressed to Public Hearing Management, Department of Energy, Box TX, Room 2313, 2000 M Street, NW., Washington, D.C. 20461, on or before January 29, 1979. Persons making a request to speak should describe their interest in the proceeding, provide a concise summary of the proposed oral presentation and a phone number where they may be reached. Each person who, in DOE's judgment, proposes to present relevant and material information will be notified by DOE of their participation to be heard before 4:30 p.m., February 2, 1979, and shall be expected to submit 15 copies of the proposed statement to Public Hearing Management, Department of Energy, Box TX, Room 2313, 2000 M Street, NW., Washington, D.C. 20461, on or before February 9, 1979.

2. *Conduct of Hearing.* DOE reserves the right to arrange the schedule of presentations to be heard and to establish procedures governing the conduct of hearings. The length of each presentation may be limited, based on the number of persons requesting to be heard. A DOE official will be designated as presiding officer to chair the hearing. This will not be a judicial or evidentiary-type hearing. Questions may be asked only by those conducting the hearing and there will be no cross-examination of persons presenting statements.

Any participant who wishes to ask a question at the hearing may submit the question, in writing, to the presiding officer who will determine whether the question is relevant and material, and whether time limitations permit it to be presented for answer.

Any other procedural rules needed for the proper conduct of the hearing will be announced by the presiding officer.

A transcript of the hearing will be made and the entire record of the hearing, including the transcript, will be retained by DOE and made available for inspection at the DOE Freedom of Information Office, Room 2107, 1200 Pennsylvania Avenue, NW., Washington, D.C. 20461, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday. Any person may purchase a copy of the transcript from the reporter.

III. Additional Information

In accordance with its proposed plan for improving Government Regulations (43 FR 18634, May 1, 1978), DOE has determined that this proposed regulation is significant because Congress regards the accelerated development of geothermal energy to be of widespread concern. Further, geothermal energy development is a significant part of the National Energy Plan for expansion of nonconventional sources of energy. This proposed regulation modifies an existing program, as called for by Pub. L. 95-238, and increases the amount of guarantees which may be made to an individual or for a specific project. However, the total dollar loan guaranty authorization of $300,000,000 for this program was not increased by this legislation and therefore the changes contained herein are not expected to have a major impact on the availability of geothermal energy over the program already in existence. DOE has, therefore, determined that the enhanced program as implemented by this proposed regulation will to have a major economic impact over the existing program and that the preparation of the economic regulatory analysis, called for by DOE's procedure on Improving Energy Regulations, is not necessary.

This proposed regulation which amends and revises existing program regulations has been reviewed in accordance with existing DOE policy that implements the National Environmental Policy Act of 1969 and has been determined not to be of a nature that requires the preparation of an Environmental Impact Statement pursuant to the requirements of the National Environmental Policy Act of 1969.

10 CFR Part 790 is proposed to be revised to read as follows:

Part 790—The Geothermal Loan Guaranty Program

Subpart A—General Provisions

Sec.

Subpart B—Applications

Subpart C—Servicing and Closing

AUTHORITY: Title II of the Geothermal Energy Research, Development, and Demonstration Act of 1974, Pub. L. 93-410; Department of Energy Organization Act, Pub. L. 95-91; Title V of the Department of Energy Act of 1978—Civilian Applications, Pub. L. 95-238.

Subpart A General Provisions

§ 790.1 Purpose.

The purpose of this regulation is to set forth policies and procedures under which the Department of Energy (DOE) will issue a Federal guaranty on loans related to the commercial development of practicable means to produce, in an environmentally acceptable manner, energy from geothermal resources.

§ 790.2 Objectives.

The objectives of the Federal geothermal loan guaranty program are: (a) To encourage and assist the private and public sectors to accelrate development of geothermal resources with environmentally acceptable processes by enabling the Secretary of the Department of Energy in the exercise of reasonable judgment, to minimize a lender's financial risk that is associated with the development of new geo-

thermal resources and technology; (b) to develop normal borrower-lender relationships which will in time encourage the flow of credit for the utilization of geothermal resources without the need for Federal assistance; and (c) to enhance competition and to encourage new entrants into the geothermal market.

§ 790.3 Effective date. [Reserved]

§ 790.4 Eligible loans and priorities.

(a) The Secretary may approve agreements to guaranty, and commitments to guaranty, lenders against the loss of principal and accured interest on loans made by such lenders to qualified borrowers. Any such agreements shall be made subject to the application of priorities and preferrential considerations for guarantees as set forth in paragraph (b) of this section and subject to criteria in § 790.6. Such agreements may be entered into only for the purposes of:

(1) Determination and evaluation of the commercial potential of geothermal resources;

(2) Research and development with respect to geothermal extraction and utilization technologies, including but not limited to the mitigation of adverse environmental effects;

(3) Acquisition of rights in geothermal resources;

(4) Development, construction, and operation of facilities for the demonstration or commercial production of energy through the use of geothermal resources; or,

(5) Construction and operation of a new commercial, agricultural, or industrial structure or facility or modification and operation of an existing commercial, agricultural, or industrial structure or facility, when geothermal hot water or steam is to be used within or by such structure or facility, or modification thereto, for the purposes of space heating or cooling, industrial or agricultural processes, onsite generation of electricity for use other than for sale or resale in commerce, other commercial applications, or combinations of applications separately eligible for loan guaranty assistance under this regulation.

(b) In complying with the objectives of the Geothermal Loan Guaranty Program, the Secretary will give first priority consideration to those applications for projects having a plan of operations which shows substantial promise of the prompt development of useful energy from geothermal resources. Second priority consideration will be given to those applications for projects designed to demonstrate or utilize new technological advances. Third priority will be given to projects that will demonstrate or exploit the commercial potential of new geothermal resource areas. The Secretary will give lower priority consideration to applications involving projects that initially propose geological and geophysical exploration, or the acquisition of land or leases. Within each category of priority as described herein, preferential consideration will be given to (1) applications in which the lender is providing a portion of the loan for which a guaranty is not requested, (2) projects to be carried out by small public and private utilities and small businesses, and (3) projects from which the Federal Government will receive royalty payments.

(c) Not less than ten percent of the amount available for loan guarantees during a fiscal year will be allocated to guarantees on loans to small public and private utilities and small businesses, as defined in § 790.5. The Secretary, at his discretion, may adjust the allocation reserved for such concerns. To the extent that guarantees on loans to such concerns are not issued within six months following the beginning of each fiscal year, the uncommitted allocation of loan guarantees for such concerns, at the discretion of the Secretary, may become available on an unrestricted basis.

(d) A loan application which, in the Secretary's view, should meet usual loan standards of lenders without a Federal guaranty will be regarded by the Secretary as not eligible for a loan guaranty under this regulation. In addition, an application for a loan for a portion of the project, or an application which does not present an acceptable plan to repay the proposed guaranteed debt, or for projects which are devoted exclusively to the extraction or production of geothermal byproducts as defined in § 790.5(b), or projects devoted exclusively to the desalination of geothermal brines will not be eligible for a Federal loan guaranty under this regulation.

(e) No loan shall be guaranteed if the income from such loan is excluded from gross income for purposes of Chapter I of the Internal Revenue Code of 1954, referred to in this section as Tax Exempt Securities. However, a guaranty may be issued in accordance with this regulation on a debt issued by, or on behalf of, a State, political subdivision, or Indian Tribe (which would normally issue Tax Exempt Securities) if the income received by a purchaser of that debt is included as gross income for purposes of Chapter I of the Internal Revenuue Code of 1954, as amended. For such transactions, the Secretary shall pay to the issuer of the debt that portion of the interest which is found to be appropriate after consultation with the Secretary of the Treasury, regarding current market yields on other obligations of the issuer or other obligations which have similar terms and conditions. Payments under this subsection by the Secretary shall be made to the issuer in accordance with terms and conditions in the guaranty agreement.

§ 790.5 Definitions.

For purposes of this regulation:

(a) "Geothermal resources" means (1) all products of geothermal processes, embracing indigenous steam, geopressured fluids, hot water, and brines, (2) steam and other gases, hot water and hot brines resulting from water, gas, or other fluids artificially introduced into geothermal formations, and (3) any byproduct derived from them;

(b) "Byproduct'" means any mineral or minerals or gases which are found in solution or in association with geothermal or geopressured resources and which have a value of less than 75 percent of the value of the geothermal steam and associated geothermal resources or are not, because of quantity, quality, or technical difficulties in extraction and production, of sufficient value to warrant extraction and production by themselves;

(c) "Secretary" means the Secretary of the Department of Energy or a representative authorized by the Secretary;

(d) "Manager" means the Manager of the Department of Energy's San Francisco Operations Office, 1333 Broadway, Oakland, California 94612, or a duly authorized representative of the Manager;

(e) "Lender" means any person engaged in the business of lending money and having the capability of servicing the loan, or the Federal Financing Bank.

(f) "Qualified Borrower" (after this referred to as the borrower) means any public or private agency, institution, joint venture, limited partnership, association, cooperative, partnership, corporation, individual, political subdivision, or other legal entity having authority to enter into a loan agreement and who meet the criteria of this regulation.

(g) A "loan" is an obligation involving a borrower and a lender, evidenced in writing, making available to the borrower money at a specified rate of interest for a limited period of time. The loan instrument may not provide for conversion into an equity relationship with the borrower;

(h) "Project" means an undertaking to develop geothermal resources at a specific site which when completed will result in an identifiable product, system, or resource for which a market potentially exists. Examples of a project include, but are not limited to, exploration and full-field development well drilling, power plant construction, equipment manufacturing,

research and development, construction of transmission lines from a geothermal power plant, and other ventures to utilize geothermal energy to serve as an energy source for direct heat applications, such as crop drying and greenhousing;

(i) A "small public or private electric utility, including its affiliates," is a business concern primarily engaged in the generation, transmission and/or distribution of electric energy for sale whose total electric output for its preceding fiscal year did not exceed four million megawatt-hours;

(j) A "small business, including its affiliates," is a concern which is independently owned and operated, is not dominant in its field of operation, and which does not have assets exceeding $9 million, or a net worth in excess of $4 million, and does not have an average net income, after Federal income taxes, for the preceding two years in excess of $400,000 (average net income to be computed without benefit of any carryover loss);

(k) "Default" means only the actual failure by the borrower to make payment of interest or principal in accordance with a schedule in the loan agreement, or to meet other requirements specified as a default condition in the guaranty agreement;

(l) "Estimated aggregate cost of the project" means those reasonable and customary costs incurred or to be paid by the borrowers which are directly connected with the project, including construction and start-up costs but excluding costs specified in § 790.22(c).

(m) "Holder" means the entity that lawfully holds all or any part of the guaranteed loan; and,

(n) "Guaranty fee" means a charge made by DOE for its administrative cost in processing and monitoring guaranteed loans and for probable guaranteed loan losses.

(o) "Federal Finance Bank" means the agency operating within the United States Department of the Treasury which has the authority to purchase Federally guaranteed debt.

§ 790.6 Loan guaranty criteria.

In addition to meeting the requirements for eligibility set forth in § 790.4(a), a guaranty or commitment to guaranty may be made only if the following conditions are met as determined by the Secretary on the written recommendation by the Manager: (Criteria applicable to the lender may not pertain to guarantees in which the Federal Financing Bank is the lender).

(a) The application form is signed by an authorized official of the lender and the borrower;

(b) The lender has demonstrated a willingness and capability of servicing the loan in an acceptable manner;

(c) The lender has set forth reasons acceptable to the Secretary why the loan would not be made to the borrower without a Federal loan guaranty;

(d) There is satisfactory evidence demonstrating that the lender is competent to administer loan terms and conditions, and is competent to administer terms and conditions in the guaranty agreement that are applicable to the lender;

(e) The guaranty shall apply only to the amount of the loan that does not exceed 75 percent of the estimated aggregate cost of the project.

(f) When the amount of the guaranty requested is equal to 100% of the loan made by the lender, the lender must set forth reasons satisfactory to the Secretary fully establishing why it is unwilling to undertake a loan having less than the maximum guaranty;

(g) The loan bears interest at a rate not to exceed an annual percent on the principal obligation outstanding as the Secretary determines, in consultation with the Secretary of the Treasury, to be reasonable, taking into account the range of interest rates for similar loans and risks which are Federally guaranteed.

(h) The term of the loan requires, as determined by the Secretary, the lesser of (1) full repayment over a period of no more than 30 years, (2) no longer than the expected average useful life of major physical assets essential to the project, or (3) the borrower's ability to repay the loan based on the project's cash flow projection.

(i) The amount of the loan together with other funds available to the borrower will be sufficient to carry out the project;

(j) There is reasonable assurance of repayment of the guaranteed portion of the loan by the borrower, and assurance that loan repayment is not dependent on interest or principal assistance;

(k) The amount of a guaranty for any loan for a project does not exceed $50,000,000.

(l) The total dollar amount of guarantees made under this regulation for any combination of outstanding loans to any single borrower does not exceed $200,000,000, unless the Secretary determines in writing that a guaranty in excess of these amounts is in the national interest and does not adversely impact competition. Such determinations shall be submitted to the Speaker of the House and the Chairman of the Committee on Science and Technology of the House of Representatives, and to the President of the Senate and the Chairman of the Committee on Energy and Natural Resources of the Senate, accompanied by a full and complete report on the proposed project and guaranty. The proposed guaranty or commitment to guarantee will not be finalized prior to the expiration of 30 calendar days (not including any date on which either House of Congress is not in session) from the date on which the report is received by the Speaker of the House and the President of the Senate.

(m) The project is to be performed in the United States, its territories or possessions, or on property owned or leased by the United States outside the United States, its territories or possessions;

(n) The project is technically feasible;

(o) There is acceptable evidence that the borrower will initiate and complete the project in a timely and efficient manner;

(p) There is a sufficiency of encouraging geophysical, geological, hydrological and geochemical data;

(q) The borrower agrees to make available to the Secretary on a timely basis adequate technical or economic information as specified in the guaranty agreement, and, subject to provisions in § 790.20(b)(2), and further agrees to the public dissemination of specified project information.

(r) There is satisfactory evidence of the borrower's interest in geothermal resources;

(s) There is satisfactory evidence that the project will be carried out by the use of environmentally acceptable processes in such a manner as to mitigate any adverse environmental impact to the maximum extent practicable, and to comply with any applicable environmental protection and pollution control requirements.

(t) The environmental risks of the project have been evaluated in accordance with § 790.23;

(u) The terms and conditions set forth in the loan agreement are acceptable;

(v) The borrower and any non-guaranteed lender agree in writing that the terms and conditions set forth in a non-guaranteed loan agreement relating to the project must be acceptable to the Secretary before such agreement is effective;

(w) The Secretary of the Treasury has insured the Secretary of Energy to the maximum extent feasible that the timing, interest rate, and terms and conditions of any guaranty exceeding $25,000,000 will have the minimum possible impact on the capital market of the United States taking into account other Federal direct and indirect commercial securities activities; and

(x) There are no significant adverse competitive impacts from cumulative guarantees in excess of $50,000,000 to any single borrower.

§ 790.7 Interest and principal assistance.

(a) Whenever the borrower is unable to pay required interest or principal, the Manager, upon approval by the Secretary, may enter into interest or principal assistance contracts with the borrower to pay the lender for and on behalf of the borrower the interest charges or principal payments which become due and payable if the Secretary finds that:

(1) The borrower is unable to meet such payments and is not in default;

(2) That it is in the public interest to permit the borrower to continue to pursue the purposes of the project; and,

(3) That the probable net cost to the Federal Government in paying such amounts will be less than that which would result in the event of a default.

(b) The amounts which the Manager is authorized to pay under an interest or principal asistance agreement shall be no greatyer than the amount of interest or principal which the borrower is obligated to pay under the loan agreement; and

(c) The principal or interest assistance agreement shall provide that the borrower repay the amounts received on terms and conditions, including interest, which are satisfactory to the Secretary.

§ 790.8 [Reserved]

§ 790.9 Period of guarantees and assistance contracts.

No loan guaranty agreements or commitments to guaranty will be made or interest or principal assistance contracts entered into after September 3, 1984. Guaranty agreements in effect at that time will continue until the term of the loan is completed or until the guaranteed portion of the loan is repaid in full with accrued interest, whichever occurs first. Similarly, interest or principal assistance contracts in effect on September 3, 1984, will remain in effect until the contract term expires or is otherwise terminated.

§ 790.10 Information for States and Indian Tribes.

The Secretary, the Manager, or a Regional Representative of the Secretary will, as appropriate, meet with Governors of directly affected States, regional associations of Governors, heads of State agencies and commissions responsible for energy or environmental matters, and Indian Tribes for the purpose of:

(a) Discussing the status of projects guaranteeed under this regulation;

(b) Identifying means to remove or mitigate legal and regulatory barriers to the accelerated use of goethermal resources;

(c) Evaluating plans to encourage growth in the geothermal industry;

(d) Discussing community impacts which may result from projects receiving a loan guaranty under this regulation; or

(e) Other areas deemed appropriate.

§ 790.11 Full faith and credit and incontestability.

The full faith and credit of the United States is pledged to the payment of all guarantees issued in accordance with these regulations, and such guarantees shall be valid and incontestable by the Government, except for fraud or misrepresentation by the holder of the guaranteed obligation. A guaranty agreement entered into in accordance with these regulations shall be conclusive evidence that the guaranty and the underlying loan are in compliance with applicable laws and these regulations, and that such loan has been approved.

§ 790.12 Use of Federal Financing Bank.

(a) Loans guaranteed in accordance with these regulations may be funded through the Federal Financing Bank whenever the Secretary has made each of the following determinations:

(1) The loan is 100% guaranteed;

(2) Private funding of the debt is not available at acceptable terms, rate or fees acceptable to the Secretary; and

(3) Federal Financing Bank funding will not have a material adverse affect on the objectives of the program.

(b) Whenever a loan is funded through the Federal Financing Bank, the loan shall be serviced in accordance with the loan servicing requirements of these regulations by parties acceptable to the Manager. The servicing cost shall be paid by the borrower in addition to any guaranty fee charged by the lender to the borrower, and may be included in the estimated aggregate cost of the project.

§ 790.13 Deviations.

To the extent that such requirements are not specified by Pub. L. 93-410 as amended or other applicable statutes, DOE's Assistant Secretary for Resource Applications may authorize deviations on an individual application basis from the requirements of this regulation (except § 790.23) upon a finding that such deviation is essential to program objectives and the special circumstances in the application submitted by the borrower and lender make such deviation clearly in the best interest of the Government. Recommendation for any deviation shall be submitted in writing by the Manager to the Assistant Secretary for Resource Applications. Such recommendations should include a supporting statement, which indicates briefly the nature of the deviation requested and the reasons therefore. This deviation authority may not be redelegated.

Subpart B—Applications

§ 790.20 Filing.

(a) A completed application for a loan guaranty under this regulation must be on a form provided by the Manager and be signed by the prospective borrower and submitted to the Manager who is responsible for processing the application. If the application involves a private lender, the form shall be signed by the lender. Application forms and information regarding the filing of applications may be obtained from the Director, Geothermal Loan Guaranty Program Office, San Francisco Operations Office, Department of Energy, 1333 Broadway, Oakland, California 94612. Telephone (415) 273-7151.

(b)(1) Prior to receipt of an application, the Manager is authorized to conduct preliminary discussions with prospective lenders or borrowers wishing to obtain information or advice regarding eligibility for a loan guaranty and compliance with filing requirements.

(2) Subject to requirements of law and applicable regulations, information such as trade secrets, commerical and financial information, geological, geophysical and geographical information and data (including maps) concerning wells which the borrower or lender submits to DOE during the preliminary discussion or at any other time throughout the duration of the project on a privileged or confidential basis, will not be publically disclosed by DOE without prior notification to the submitter. Information asserted by the borrower or lender to be privileged or confidential shall be appropriately identified and marked. The guaranty agreement shall identify those items of information which the borrower will make available to the Manager for public dissemination.

(c) Supporting information and cost data submitted by the applicants shall be updated and furnished to the Manager whenever changes occur during the pendancy of the guaranty application.

§ 790.21 Supporting information.

(a) The lender and borrower shall provide information, as prescribed by the Manager, to supplement the application. The following items are provided to illustrate the range of supporting information which may be required to enable the Manager to prepare a recommendation with respect to any pending application.

(1) Full description of the scope, nature, extent, milestones and location of the proposed project;

(2) A detailed budget-type breakdown of both the estimated aggregate cost of the project and the amount to be borrowed;

(3) Evidence showing that the amount of the loan together with equity or other financing will be sufficient to complete the project;

(4) The borrower's plan to repay the loan, including cash flow projections, assumptions regarding marketability of the project's results or product, descriptions of the project's technical and economic feasibility, and environmental acceptability;

(5) The aggregate outstanding amount of guaranty commitments or guaranteed loans made to the borrower under the provisions of these regulations;

(6) Where relevant to the purpose of the loan guaranty, a copy of the borrower's title or lease agreement to the property on which the project is to be carried out, supported by title opinion or other acceptable evidence of the borrower's ownership interest;

(7) Subject to § 790.20(b)(2), technical information and reports, geophysical data, well logs and core data, financial statements, milestone schedules, and maps and charts;

(8) Information covering the management experience of each officer or key person in the borrower's organization who is to be associated with the project and a description of salaries (and other financial remuneration including profit sharing and stock options) to be paid to officers and employees of the borrower that are, or will be, directly associated with the project;

(9) A description of the borrower's management concept, and business plan or plan of operations, to be employed in carrying out the project;

(10) A description of the intended sources and amount of capital and its form (equity, loans from principals, loans from the lender, outside financing, or factoring) together with evidence of a commitment from these sources and a copy of each such agreement, and evidence of the financial ability of each source to honor its commitment;

(11) A listing of assets associated or to be associated with the project, including appropriate data as to value and useful life of major assets essential to the project, and a description of any other security;

(12) A listing of all permits or authorizations required by Federal, State and local government agencies to conduct the project and a copy of each application for approval of such permits or authorizations when issued or a statement of planned filing dates and expected date of approval;

(13) A description of the borrower's organization and, as applicable, a copy of the business certificate, partnership agreement or corporate charter, bylaws, and appropriate authorizing resolutions;

(14) The lender's written assessment of all aspects of the borrower's loan application in such detail as would be expected by prudent lenders considering a loan without a guaranty, together with copies of the proposed loan agreement, the borrower's financial statements, investigations from credit bureaus, references, bank inquiries, and professional organizations;

(15) A copy of all existing loan agreements and written assurance from any existing lenders of project funds that the loan amounts as well as terms and conditions imposed by lenders on such loans will not be altered in any significant respect without the prior approval of the Secretary;

(16) Evidence of consultation conducted by the borrower with appropriate agencies of any affected State regarding the proposed project, and a description of any adverse social or economic impacts which may occur in the community in which the project will be located;

(17) A disclosure by the lender of (i) whether any of its officers, directors, major stockholders or other major owners have a financial interest in the borrower and (ii) whether any of the borrower's officers, directors, major stockholders or other major owners have a financial interest in the lender; and,

(18) Any other information required by the Manager to fully evaluate the guaranty application.

(b) In addition to supporting information illustrated in paragraph (a) of this section, the Manager may independently obtain or may require the lender to include with the guaranty application information regarding the lender as deemed necessary by the Manager, including but not limited to:

(1) Description of the lender's organization and a copy of the business certificate, partnership agreement or corporate charter, bylaws, and appropriate authorizing resolutions;

(2) Copies of investigation reports obtained from credit bureaus, reference and bank inquiries, and professional associations;

(3) A description of the management experience of each officer or key person in the lender's organization who will be servicing the loan;

(4) A description of the management techniques to be employed by the lender in surveillance of the loan;

(5) When appropriate to the project, evidence of the lender's experience in surveying the financial aspects of complex technological projects; and

(6) A copy of the lenders' conditional loan commitment document, if any, issued to the borrower.

(c) The Manager shall consider the application and other relevant information and shall be responsible for: (1) Determining whether the application is in compliance with these regulations; (2) assessing and evaluating the financial, technical, environmental, legal, management, and marketing aspects of the project; (3) assessing the availability of the project's financing, other than that provided by the proposed guaranty for the project, and assessing whether such financing is adequately committed; and, (4) recommending to the Secretary approval or nonapproval of the application. The Manager shall include with a recommendation for approval a proposed guaranty agreement containing appropriate terms and conditions pertinent to the project, previously discussed and negotiated by the Manager with the lender and borrower. When not approved by the Secretary, the Manager will provide the borrower and lender with a written statement setting forth the basis for the non-approval of the guaranty application.

§ 790.22 Project cost illustrations.

(a) The cost elements set forth in paragraphs (b) and (c), of this section are only for the purpose of illustrating the manner by which the estimated aggregate cost for construction and initial startup of the project can be determined. It is expected that these project costs will be recorded in accordance with generally accepted accounting principles and practices which are consistently applied.

(b) Except as set forth in paragraph (c) of this section, reasonable and customary costs for construction and initial startup paid or to be paid by the borrower or the applicants for a guaranty that are directly connected to the project are generally permitted in computing the estimated aggregate project cost. These costs include, but are not limited to the following:

(1) Employees' salaries and wages, consultant fees and other outside assistance;

(2) Land purchase or lease payments, including reasonable real estate commissions;

(3) Engineering fees, surveys, plates, title insurance, recording fees and legal fees incurred in connection with land acquisition;

(4) Site improvements, site restoration and abandonment costs, access roads and fencing;

(5) Drilling of exploration wells, shallow heat-flow wells, and test, production and reinjection wells;

(6) Buildings, transmission lines, powerplant equipment, and machinery;

(7) Taxes (including tax advances associated with community impact planning) to be paid to Federal, State and

local government agencies and other taxing authorities;

(8) Insurance, including flood insurance, and bonds of all types;

(9) Engineering, geological, and architectural fees paid in connection with drilling, machinery selection, design, acquisition and installation;

(10) Research, exploration or development necessary to complete the project;

(11) Professional services and fees necessary to obtain licenses and permits and to prepare environmental reports and data;

(12) Interest costs charged by the lender;

(13) Interest payments to other lenders;

(14) Costs incurred for the benefit of the project prior to approval of the guaranty agreement that are directly connected with the project;

(15) Technical and socio-economic information dissemination costs, and community impact assistance costs;

(16) Costs to provide safety and environmental protection equipment, facilities and services;

(17) Travel and transportation costs;

(18) Bond financing costs and trustee fees;

(19) Fees for royalties and licenses;

(20) Costs associated with acquiring geophysical and other technical data;

(21) Financial and legal services costs;

(22) Costs to comply with terms and conditions specified in the guaranty agreement or with applicable laws, rules and regulations.

(23) Expenses associated with initial period of starting operations; and

(24) A contingency reserve.

(c) Costs which are not considered as part of the estimated aggregate cost of the project and are not a project cost are illustrated below:

(1) Company organizational expenses;

(2) Parent corporation general and administrative expenses and other parent corporation assessments;

(3) Dividends and profit sharing to stockholders, employees and officers;

(4) Goodwill, franchises, or trade or brand name costs;

(5) Except as provided in § 790.31, fees and commissions charged to the borrower for obtaining loans and Federal assistance;

(6) Loan commitment fees charged by lenders, except as specifically approved by the Secretary, and finders' fees;

(7) Operation expenses (including interest costs) incurred after an initial period of start-up; and,

(8) Costs that are excessive or are not directly required to carry out the project.

(d) Independently, or at the direction of the Secretary, the Manager may cause to be performed a review of any or all cost elements included by the applicant in the estimated aggregate project cost. The applicant shall make available records and other data necessary to permit the Manager to carry out such review. In carrying out this responsibility, the Manager may utilize employees of Federal agencies or may direct the applicant to submit to a review performed by an independent public accountant or other competent authority.

(e) When costs incurred prior to the approval of the guaranty agreement, as provided in § 790.22(b)(14), are included in the estimated aggregate project cost, the applicant, if requested by the Manager, shall make available to auditors selected by the Manager financial and other records necessary to complete an audit of such costs if requested by the Manager.

(f) In the case of a guaranty for the purposes specified in § 790.4(a)(5), the aggregate cost of the project can be that portion of the total cost of construction and start-up operations which is directly related to the utilization of geothermal energy within the structure or facility, except that the aggregate cost of the project may include construction and start-up operations when the facility or structure is to be located near a geothermal energy resource predominantly for the purpose of utilizing geothermal energy, or as determined by the Secretary the economic viability of the project is substantially dependent on the performance of the geothermal reservoir.

§ 790.23 Environmental considerations.

(a) The issuance of a Federal guarantee for a loan under these regulations is subject to the provisions of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq. Pub. L. 91-190) and applicable regulations, rules and guidelines implementing NEPA. NEPA requires the identification and environmental review of "major Federal actions significantly affecting the quality of the human environment." DOE shall follow its general regulation governing its procedures and policies implementing NEPA.

(b) In addition to generally applicable criteria used to determine the proper scope of environmental review to be accorded individual applications, DOE shall review and consider the environmental impacts associated with the commercial operation of the project throughout its useful life. Such considerations shall be carried out even where the proposed guaranty may be limited to only a small or preliminary segment of the entire commercial project. (For example, if the guaranty is for a project to complete a steam supply system for a future powerplant, the environment impacts of construction and operation of the powerplant and related transmission lines over the useful life of the plant would be evaluated along with the impacts associated with drilling and surface gathering construction.) Any specific action under a guaranty, such as approval of a disbursement, shall not be made unless the applicable requirements of the NEPA and the DOE implementing NEPA regulations have been met.

(d) The issuance of a loan guaranty under this regulation is subject to the provisions of Executive Order 11988—Floodplain Management, and 11990—Protection of Wetlands. Borrowers applying for loan gurantees under this regulation should familiarize themselves with these Orders and with the DOE regulations implementing them (proposed 10 CFR Part 1022, published at 43 FR 31108, July 19, 1978).

§ 790.24 Mandatory purchase of flood insurance.

The Flood Disaster Protection Act of 1973 (Pub. L. 92-234) may require purchase by the borrower of flood insurance as a condition of receiving a guaranty on loans for acquisitions or construction purposes in an identified flood plain area having special flood hazards. Questions emanating from borrowers or lenders regarding compliance with provisions of the Flood Disaster Protection Act and guidelines of the Federal Insurance Administration will be referred to the Manager.

Subpart C—Servicing and Closing

§ 790.30 Loan servicing by lender.

Except when the loan is placed through the Federal Financing Bank, guaranty agreements approved in accordance with these regulations shall provide that:

(a) Loan servicing is a responsibility of the lender who shall exercise such care and diligence in the disbursement, servicing, and repayment of the loan as would be exercised by a reasonable and prudent lender in dealing with a loan without guaranty;

(b) The loan agreement shall provide specific dates for the payment of principal and interest and shall provide a period of grace of not less than 30 days for the making of any payment. The lender shall not grant the borrower any further extension of time over and above any grace period without the prior written consent of the Manager;

(c) The lender shall notify the Manager in writing without delay:

(1) That disbursement for the first project milestone is ready to be made, together with evidence from the bor-

rower that the project has commenced or is about to commence;

(2) Of the date and amount of disbursement for each subsequent project milestone under the loan;

(3) If, excluding any grace period, the lender has not received payment within 10 days after the date specified for payment in the loan agreement, together with evidence of appropriate notifications made by the lender to the borrower;

(4) Of any failure, known to the lender, by an intended source of capital to honor its commitment;

(5) Of any failure by the borrower, known to the lender, to comply with terms and conditions as set forth in the loan agreement and any failure by the borrower to comply with guaranty terms and conditions that the lender has agreed to monitor;

(6) If the lender has information that the borrower may be approaching any of the default conditions set forth in the loan agreement or that the borrower may not be able to meet any future scheduled payment of principal or interest; or

(7) Of all material changes from the cash flow projections in effect at the time the loan guaranty application is approved.

(d) The lender agrees not to demand accelerated repayment unless the borrower has defaulted in the payment of principal or interest or in other cases if such demand has been approved in writing by the Manager.

(e) The loan agreement may defer the repayment of principal for a period of time as agreed to by the Secretary.

(f) The guaranty agreement shall require the lenders to submit to the Manager periodic financial reports on the status and condition of the guaranteed loan. The guaranty agreement shall prescribe the frequency, format and content of these reports. However, such report shall, as a minimum, be required annually. Reports shall be furnished to the Manager until such time as the guaranteed portion of the loan and interest or principal assistance is repaid.

§ 790.31 Guaranty fee.

(a) A guaranty fee of not more than one percent shall be paid annually by the lender at a rate specified in the guaranty agreement. Fees collected by the Manager shall be deposited in the Geothermal Resource Development Fund. The fee shall be imposed on the average amount of the guaranteed portion of the loan outstanding during the year. The fee requirement may be passed to the borrower by the lender and in such instances may be included in the estimated aggregate cost of the project. When the Federal Financing Bank is the lender, the borrower shall pay the guaranty fee directly to the Manager.

(b) At the time the guaranty agreement is concluded, as set forth in § 790.45(d), the lender shall present to the Manager payment of the first year's guaranty fee. Subsequent payments of the fee shall be made yearly by the lender on the anniversary date of closing. If an interest or principal assistance contract is in effect, payments of this fee, if passed by the lender to the borrower, may be deferred by the Secretary for an appropriate time.

(c) The Secretary shall periodically determine whether the guaranty fee being imposed is sufficient to cover anticipated administrative, probable default, and when appropriate, establish a revised fee rate, not to exceed one percent, to be applied to new guaranty agreements.

§ 790.32 Geothermal resources development fund.

(a) As provided in Sec. 204(a) of Pub. L. 93-410, there is established in the Treasury of the United States a Geothermal Resources Development Fund, which is available to the Secretary in carrying out any loan guaranty, interest or principal assistance, and interest differential payments. Balances in the Fund are available for necessary administrative expenses incurred by or on behalf of DOE in carrying out the provisions of this regulation.

(b) Appropriations to the Geothermal Resource Development Fund that are made available through legislation, or repayments made by borrowers in accordance with terms and conditions in interest or principal assistance contracts, or amounts returned through recoveries by the U.S. Attorney General, or amounts collected as guaranty fees shall be deposited in the Fund.

(c) If at any time Geothermal Resource Development Fund balances are insufficient to enable the Secretary to discharge DOE's obligations and responsibilities under this regulation, the Secretary, subject to provisions in appropriations acts, may borrow funds from the secretary of the Treasury upon the issuance of notes or other obligation instruments containing terms and conditions prescribed by the Secretary of the Treasury.

§ 790.33 Project monitoring.

The guaranty agreement shall provide that employees and representatives of DOE shall, with the Manager's approval, have access at reasonable times and under reasonable circumstances to the project site. The lender, to the extent lawful and within its control, and borrower will assure availability of information related to the project as is necessary to permit the Manager to determine technical progress, soundness of financial condition, management stability, compliance with environmental protection requirements, and other matters pertinent to the guaranty.

§ 790.34 Loan disbursements by lender.

(a) Unless otherwise provided in the guaranty agreement, the lender shall not provide the borrower with any funds under the loan agreement until the lender has:

(1) Provided the notification set forth in § 790.30(c) (1) and (2) and has received written notice from the Manager that disbursement for the applicable milestone is approved; and,

(2) Received from the borrower satisfactory documentary evidence, as provided in § 790.35, that loan drawdowns requested will be used to pay allowable project costs incurred or to be incurred by the borrower.

(b) When the loan is fully guaranteed, the guaranty agreement shall provide that the lender will withhold loan drawdowns from the borrower only upon written notification from the Manager.

§ 790.35 Satisfactory documentary evidence.

The loan agreement shall provide that the borrower furnish to the lender a written statement in support of each request by the borrower for loan drawdowns. This statement shall set forth in such detail as the lender or Manager may require the purposes for which drawdown is requested and an attestation that such disbursements will be used only for such purposes. Each such request shall be signed by a person authorized to order the expenditure of the borrower's funds.

§ 790.36 Reduction or withdrawal of guaranty.

The Secretary, may, upon the written recommendation of the Manager, reduce or withdraw any guaranty by written notice to the lender and the borrower if he determines that:

(a) Initiation of the project has not occurred within the period of time set forth in the guaranty agreement. Within 60 days after the guaranty is withdrawn under this circumstance, the Manager shall reimburse the lender for the full amount of the guaranty fee paid by the lender if the fee has not been passed to the borrower;

(b) The borrower has failed to acquire capital from intended or alternate sources, or has failed to comply with material terms and conditions as set forth in the loan or guaranty agreement. The Manager shall, if appropriate, notify the borrower and the

lender that the guaranty shall be reduced to the amount that has been received by the borrower as of the date of the notice. Drawdowns permitted by the lender after such notification is received will not be covered by the guaranty; or

(c) The lender has failed to comply with any material term or condition set forth in the guaranty or loan agreement. The guaranty may be reduced to the amount that has been received by the borrower as of the date the Manager's notice of reduction of the guaranty. Notice of the Manager's finding that a material term has not been complied with by the lender shall be sent by the Manager to the borrower and the lender. Following notification, the borrower will be allowed reasonable time to acquire a substitute lender that is capable of complying with provisions in the loan and guaranty agreements. If the borrower obtains a substitute lender satisfactory to the Secretary, a new guaranty agreement will be executed. Upon execution of the guaranty agreement by the substitute lender and DOE, the Secretary may provide that the original lender shall be reimbursed by the borrower for unpaid principal outstanding and accrued interest.

(d) In the event the Secretary, in his descretion determines, upon recommendation by the Manager of discussions with the borrower and lender, that the project's economic success or environmental acceptability is no longer achievable. Written notice shall be given to the borrower and lender of this determination and the guaranty shall then be reduced to amounts which have been received by the borrower as of the date that the notice is received by the lender.

§ 790.37 Default, demand, payment and collateral liquidation.

(a) In the event that the borrower has defaulted in the making of required payments of principal or interest on any portion of a loan guaranteed in accordance with these regulations, and such default has not been cured within the period of grace provided in the loan agreement, the lender, or any other holder, or nominee or trustee empowered to act for the lender or holder (referred to in this section collectively as "holder"), may make written demand upon the Manager for payment pursuant to the guaranty agreement.

(b) In the event that the borrower is in default as a result of a breach of one or more of terms and conditions of the guaranty agreement, note, loan agreement, or other contractual obligation related to the transaction, other than the borrower's obligation to pay principal or interest, as provided in § 790.37(a) the holder shall not automatically be entitled to make demand for payment pursuant to the guaranty, unless the Secretary agrees in writing that such default has materially effected the rights of the parties, and finds that the holder should be entitled to receive payment of the outstanding guaranteed debt.

(c) No provision of these regulations shall be construed to preclude forbearance by the holder and the Secretary for the benefit of the borrower.

(d) Upon the making of demand for payment as provided in § 790.37 (a) or (b), the holder shall provide, in conjunction with such demand or immediately thereafter, at the request of the Manager, such supporting documentation as may be reasonably required to justify such demand.

(e) Payment of the guaranteed debt shall be made 60 days after receipt by the Manager of written demand for payment: *Provided,* The demand is in compliance with terms of the guaranty agreement, applicable law, and these regulations. The guaranty agreement will provide that interest shall accrue during that period at the rate stated in the loan agreement.

(f) Upon payment of the guaranteed debt pursuant to these regulations, the holder shall transfer and assign to the Manager all rights held by the holder in the guaranteed portion of the debt which was guaranteed. Such assignment shall include the guaranteed portion of the loan and related security and collateral rights. Through such payments and assignment, the Secretary shall be subrogated to the rights of the recipient of the payment and shall have superior rights in and to the property acquired from the recipient of the payment.

(g) Where the guaranty agreement so provides, the lender and the Manager may jointly agree to a plan of liquidation of the collateral pledged to secure the guaranteed debt, and thereafter the lender may undertake such liquidation and make application of the proceeds derived thereby in accordance with the terms and conditions of the loan and guaranty agreements and the written plan of liquidation.

(h) Where payment of the guaranteed debt has been made and the lender has not undertaken a plan of liquidation, the Secretary, in accordance with the rights received through subrogation and acting through the U.S. Attorney General, shall seek to foreclose on the collateral assets and take such other legal action as necessary for the protection of the Government.

(i) If the Secretary is awarded title to collateral assets pursuant to a foreclosure proceeding, the Secretary may take action to complete, maintain, operate, or lease the project facilities, or take any other necessary action which the Secretary deems appropriate, in order that the original goals and objectives of the project will, to the extent possible, be realized.

(j) In addition to foreclosure and sale of collateral pursuant thereto, the U.S. Attorney General shall take appropriate action in accordance with rights contained in the guaranty agreement to recover costs incurred by the Government as a result of the defaulted loan. Any recovery so received by the U.S. Attorney General on behalf of the Government shall be applied in the following manner: First to the expenses incurred by the U.S. Attorney General and DOE in effecting such recovery; second to reimbursement of any amounts paid by DOE as a result of the loan guaranty; third to any amounts owed to DOE under related principal and interest assistance contracts; and fourth to any other lawful claims held by the Government on such proceeds. Any sums remaining after full payment of the above shall be available for the benefit of other parties lawfully entitled to claim them.

§ 790.38 Perfection of liens and preservation of collateral.

(a) The guaranty agreement shall provide that: (1) The lender will take those actions necessary to perfect and maintain liens, as applicable, on assets which are pledged collateral for the guaranteed portion of the loan; and, (2) upon default by the borrower, the holder of pledged collateral shall take actions such as the Manager may reasonably require to provide for the care, preservation, protection and maintenance of such collateral so as to enable the United States to achieve maximum recovery upon default of the loan. The Manager shall reimburse the holder of collateral for reasonable and appropriate expenses incurred in taking actions required by the Manager. Except as provided in § 790.37, the lender shall not waive or relinquish, without the consent of the Manager, any collateral for the loan to which the United States would be subrogated upon payments under the guaranty agreement.

(b) In the event of a default, the Manager may enter into contracts as required to preserve the collateral for the loan and to complete unfulfilled environmental requirements. The cost of such contracts may be charged to the Geothermal Resource Development Fund.

§ 790.39 Treatment of payments.

When the lender holds a guaranteed and non-guaranteed portion of the same loan, payments of principal under the loan agreement made by the borrower shall be applied by the

lender to reduce the guaranteed and non-guaranteed portions of the loan on a proportionate basis.

§ 790.40 Assignment and participation.

(a) The lender may not assign to another lender those loan servicing functions required by the guaranty agreement unless prior written approval is obtained from the Manager.

(b) The lender may sell all or part of the guaranteed loan or provide other parties with participating shares in the guaranteed loan without the prior consent of the Secretary. However, the original lender shall continue to be responsible for and perform the duties and obligations of the lender as set forth in the guaranty agreement, unless the Secretary approves a substitute lender in accordance with § 790.36.(c).

(c) If participating shares in the guaranteed loan are sold by a lender, written notice thereof shall be given by the lender to the Manager and the borrower in the manner prescribed in the guaranty agreement.

§ 790.41 Survival of guaranty agreement.

Any guaranty agreement shall be binding upon the lender, the borrower and the Secretary and upon their successors and assigns. No delay or failure of the Secretary or the Manager in the exercise of any right or remedy and no single or partial exercise of any right or remedy shall preclude the exercise of any further rights; and no action taken or omitted by the Secretary or the Manager shall be deemed a waiver of any right or remedy of the United States. Each guaranty agreement shall contain provisions setting forth these conditions.

§ 790.42 Modifications to existing guaranty agreements.

The Manager may approve modifications to terms and conditions in existing loan and guaranty agreements only upon determining that such modifications will not (a) substantially change the project's scope, cost and purpose; (b) deviate from provisions in this regulation; or (c) compromise the loan agreement schedule for loan repayment. When the Manager finds that a substantive modification to existing terms and conditions is desirable or necessary, or is requested in writing by the borrower and lender, a written recommendation shall be forwarded for determination by DOE's Assistant Secretary for Resource Applications.

§ 790.43 Other Federal assistance.

(a) Nothing in these regulations shall be interpreted to deny or limit the borrower's right to seek and obtain other Federal financial assistance (e.g., contracts, grants, cooperative agreements, direct loans or guaranteed loans). For purposes of this section, other financial assistance does not include revenue sharing funds or any tax benefits. However, the total amount of Federal financial assistance, including guarantees made under these regulations, obtained by the borrower for the benefit of the project, shall not exceed 75 percent of the estimated aggregate cost of the project to be undertaken by the borrower.

(b) After concluding a loan guaranty agreement hereunder, the borrower shall not undertake any work in connection with the project for a Federal agency without the Manager's written approval.

§ 790.44 Inventions and other intellectual property.

(a) Inventions and other intellectual property accruing to the borrower and resulting from the project will remain with the borrower. In the case of default, such property shall be treated as project assets in accordance with terms and conditions in the guaranty agreement.

(b) The guaranty agreement may provide that inventions or other intellectual property utilized in or resulting from the project, which are owned or controlled by the borrower, shall be made available for use within the United States upon reasonable terms and conditions including provisions, if necessary, which protect the confidentiality thereof, if such action is determined by the Secretary to be in the public interest. This requirement will normally not be included where the principal purpose of the loan to be guaranteed is to utilize generally available technology to determine and evaluate a new geothermal resource base, or the acquisition of rights in geothermal resources.

(c) Where the principal purpose of the loan is for research and development with respect to extraction and utilization technologies, or for the development or demonstration of new and unique facilities or equipment, a requirement to make inventions and other intellectual property available to other domestic parties shall be included in the guaranty agreement unless the Secretary determines, upon the recommendation of the Manager, that such a requirement would either seriously impair the borrower's ability to conduct the project or the borrower's comeptitive position, or be inconsistent with the borrower's pre-existing contractual obligations. The Secretary's determination on this matter shall include consideration of whether attainment of the objectives of the geothermal loan guaranty program, as set forth in § 790.2, will be adversely affected by this requirement.

§ 790.45 Closing.

(a) When an application for a loan guaranty has been approved by the Secretary, the Manager shall notify the lender and the borrower and provide them with a copy of the guaranty agreement or commitment to guaranty approved by the Secretary;

(b) A preclosing conference will be arranged by the Manager, if the lender or borrower requests one, to discuss the terms and conditions contained in the approved guaranty agreement;

(c) Requests by the lender or borrower for substantive modification of the terms and conditions set forth in the guaranty agreement shall be submitted by the Manager for the Secretary's consideration, supported by such documentation and facts as would justify the requests; and,

(d) Immediately after approval of all terms and conditions by the parties, the Manager shall arrange with the lender and the borrower for the preparation and review of necessary documents and agree upon a date for execution of the guaranty agreement and payment of the guaranty fee.

§ 790.46 Suspension, termination or cancellation of operations or production on Federal land administered by the Secretary of the Interior.

(a) The Manager shall inform the Supervisor (as defined in 30 CFR 270.2 (c)) when a loan guaranty is approved involving a Federal lease, so as to provide for future coordination of the loan guaranty program and lease administration.

(b) Under regulations issued by the Department of Interior, a leaseholder may, as provided in 43 CFR 3205.3-8 and 30 CFR 270.17, apply for suspension of operations or production, or both, under a producing geothermal lease (or for relief from any drilling or producing requirements of such a lease). When a loan guaranty has been issued under this regulation for a project to be conducted by a qualified borrower who is a lessee under the above cited regulation, the borrower shall submit a copy of any suspension application to the Manager, together with a statement setting forth complete information showing the effect of such suspension on the borrower's ability to comply with terms and conditions set forth in the loan and guaranty agreements. The Manager shall notify the borrower and the Secretary in those situations when approval of any such application might cause default by the borrower. Except in cases where potential environmental safety or reservoir damage is imminent, the borrower shall obtain the Manager's approval prior to submitting a suspension application to the Supervisor.

(c) 43 CFR 3204.3 requires that each geothermal lease issued by the Department of the Interior provide for the readjustment of terms and conditions at not less than 10-year intervals beginning 10 years after the date geothermal steam is produced. When a guaranty under this regulation has been issued for a loan on a project to be conducted by a borrower who is a lessee, and the borrower files an objection to any proposed readjustment with the Authorized Officer (as defined in 43 CFR 3000.0-5(f)) a copy of the objection shall be submitted without delay by the borrower to the Manager. The Manager shall forward a copy of the objection to the Secretary and to those lenders concerned, and shall consult with the Authorized Officer regarding any final action by the Authorized Officer which might terminate the lease. The Manager shall prepare an assessment on the effect of the proposed readjustment of lease terms and conditions that would substantially limit the borrower's ability to comply with the terms and conditions set forth in the loan agreement. The Manager shall forward his assessment in writing to the Secretary, the Authorized Officer and the supervisor.

(d) Upon receipt by the lessee of notice of a proposed cancellation of a lease by the Authorized Officer, the lessee with a loan guaranteed under this regulation will provide the Manager and the lender with notice of such proposed action. Upon receipt of such notice the Manager will consult with the Supervisor and Authorized Officer for the purpose of determining whether the public interest can best be served by an acceptable alternative arrangement, such as obtaining assignments for a party qualified to hold geothermal leases who is a qualified borrower and who is willing to assume the original lessee's loan agreement and related undertaking, so that operation and production can continue.

§ 790.47 Appeals.

Any guaranty agreement shall include a provision that specifies that any dispute concerning a question of fact arising under a guaranty agreement shall be decided in writing by the Manager. The borrower or lender, as appropriate, may within seven days after receipt of any such decision request reconsideration by the Manager. If not satisfied with the final written decision, the borrower or lender, may appeal the decision within 30 days, in writing, to the Chairman, Board of Contract Appeals (BCA), Department of Energy, Washington, D.C. 20545. That Board when functioning to resolve such loan guaranty disputes, shall proceed in the same general manner as when it presides over appeals involving contract disputes. The decision of the Board with respect to such appeals shall be the final decision of the Department.

Signed at Washington, D.C., this 29th day of December, 1978.

STANLEY I. WEISS,
Deputy Assistant Secretary, Utility and Industrial Energy Applications, Resource Applications.

[FR Doc. 79-398 Filed 1-2-79; 3:12 pm]

Federal Register

FRIDAY, JANUARY 5, 1979
PART VII

DEPARTMENT OF ENERGY

GRANT PROGRAMS FOR CONDUCTING TECHNICAL ASSISTANCE PROGRAMS AND ADOPTION OF ENERGY CONSERVATION MEASURES FOR SCHOOLS, HOSPITALS, UNITS OF LOCAL GOVERNMENT AND PUBLIC CARE INSTITUTIONS

Proposed Rulemaking and Announcement of Public Hearings

[6450-01-M]

DEPARTMENT OF ENERGY

[10 CFR Part 455]

[Docket No. CAS-RM-78-503]

GRANT PROGRAMS FOR SCHOOLS AND HOSPITALS AND BUILDINGS OWNED BY UNITS OF LOCAL GOVERNMENT AND PUBLIC CARE INSTITUTIONS

Proposed Rulemaking and Public Hearing

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking and public hearings.

SUMMARY: The Department of Energy (DOE) proposes to implement cost sharing grant programs for conducting technical assistance programs and adoption of energy conservation measures for schools, hospitals, units of local government and public care institutions pursuant to Title III of the National Energy Conservation Policy Act (NECPA), Pub. L. 95-619, 92 Stat. 3206. Technical assistance programs will identify and evaluate attainable energy conservation objectives. Energy conservation measures will include the acquisition and installation of specific conservation systems or fixtures to reduce energy use and anticipated energy costs in school and hospital buildings. Participation in the programs is voluntary. The Secretary will make grants to States, schools, hospitals, units of local government and public care institutions for technical assistance programs, and to States, schools and hospitals for energy conservation measures.

DOE will be responsible for general program oversight. However, program management, including financial auditing, monitoring and evaluation of activities in a given State, will be the responsibility of that State. Grant applications will be reviewed by responsible State agencies for conformance with previously approved State Plans and forwarded at specified times to DOE. States will be eligible to receive grants to defray administrative and other expenses on a cost-sharing basis.

DATES: Written comments must be received by February 3, 1979, 4:30 p.m., e.s.t.

Hearings will be held on January 22-24, 1979, in Seattle, Wash., and Chicago, Ill., beginning at 9:30 a.m., local time; and on January 23, 1979, in Washington, D.C., beginning at 9:30 a.m., e.s.t.

Requests to speak at the hearings must be directed to DOE at the address given below for the appropriate city and must be received before 4:30 p.m., local time, on January 17, 1979.

ADDRESSES: Send written comments to: Office of State Specific Programs, Department of Energy, Room 6456, 12th and Pennsylvania Ave., NW., Washington, D.C. 20461.

See "XII. Comment Procedures" under Supplementary Information below.

Hearings:

City	Hearing date	Submit requests to testify to—	Hearing location
Seattle, Wash	Jan. 22, 1979 through Jan. 24, 1979.	Gilbert Haselberger, DOE, 1923 Federal Bldg., Seattle, Wash. 98174.	Hilton Hotel Downtown, 6th and University, Seattle, Wash.
Chicago, Ill	....do	Ken Johnson, DOE, 175 West Jackson, 3d floor, Chicago, Ill. 60604.	Pick Congress Hotel, 520 South Michigan Ave., Chicago, Ill.
Washington, D.C	Jan. 23, 1979 through Jan. 25, 1979.	Margaret Sibley, Office of State Specific Programs, DOE, room 6456, 12th and Pennsylvania Ave. NW., Washington, D.C. 20461.	Department of Energy, room 3000A, 12th and Pennsylvania Ave. NW., Washington, D.C.

See "XII. Comment Procedures" under Supplementary Information below.

FOR FURTHER INFORMATION CONTACT:

Michael Willingham, Director, State Specific Programs, Office of Conservation and Solar Applications, Room 6456, Federal Building, 12th and Pennsylvania Avenue, NW., Washington, D.C. 20461, (202) 633-8640.

SUPPLEMENTARY INFORMATION:

I. Introduction.

The Department of Energy proposes to amend Chapter II of Title 10 CFR by adding Subparts C through I to a previously proposed new Part 455 (see Notice of Proposed Rulemaking, 43 FR 58158 *et seq.*, dated December 12, 1978). This proposed regulation will fulfill the requirements of Title III of NECPA, which amends Title III of the Energy Policy and Conservation Act (Act), Pub. L. 94-163, 89 Stat. 871, by adding Parts G and H. Part G of the Act establishes cost-sharing energy conservation grant programs for States and public and nonprofit schools and hospitals to assist in the conduct of preliminary energy audits and energy audits, identification of cost-effective energy conservation maintenance and operating procedures and in the evaluation, acquisition and installation of energy conservation measures to reduce the energy use and anticipated energy costs of schools and hospitals.

Part H of the Act establishes cost-sharing energy conservation grant programs for States, units of local government and public care institutions to assist in the conduct of preliminary energy audits and energy audits, identification of cost-effective energy conservation maintenance and operating procedures and in the evaluation of energy conservation measures to reduce energy use and anticipated energy costs of buildings owned by units of local government and public care institutions.

DOE has already published proposed regulations for providing financial assistance to States for the conduct of preliminary energy audits and energy audits (43 FR 58158 *et seq.*, dated December 12, 1978). This proposed regulation prescribes criteria and procedures (1) for development of State Plans and approval thereof by DOE, (2) for implementation of energy conservation measures in schools and hospitals and (3) for implementation of technical assistance programs for schools, hospitals, units of local government and public care institutions. Upon DOE approval of a State Plan, a State energy agency may accept and review applications for financial assistance from eligible institutions. If applications are approved by a State as being in conformance with its approved State Plan and this regulation, the State will forward the ap-

plications once during a grant program cycle to DOE. Subject to approval by DOE, grants may then be awarded. For purposes of this regulation, a "grant program cycle" is a period of time to be specified by DOE, which is related to the fiscal year for which grant funds are appropriated during which one complete cycle of grant activity occurs, including DOE allocation of appropriations to the States, application review and approval, and grant award.

Funds available to DOE for grant awards to a State or eligible institutions thereof will be limited to sums allocated to a given State based upon a formula which includes population, climate and fuel cost factors. Neither schools nor hospitals may receive more than 70 percent of the total amount allocated to a State for schools and hospitals programs. Except in the case of severe hardship for schools and hospitals, Federal funds available for grants for technical assistance programs and energy conservation measures must be matched with at least an equal share of non-Federal funds. Moneys for the non-Federal portion of any program or measure must come from State, local or private sources and cannot, for example, be derived from revenue sharing or any other Federal source.

Grants to a State for administrative expenses may also be made for up to 50 percent of such costs. However, a grant for this purpose will not exceed 5 percent of the total granted to all institutions in a given State for a grant program cycle. DOE is particularly interested in receiving comments on this aspect of the grants program. DOE proposes to utilize funds appropriated pursuant to section 397(b) of the Act for energy conservation project grants and section 400G(b) of the Act for technical assistant grants, to fund grants to States for the purpose of helping to defray the State's administrative expenses of evaluating, financial auditing, monitoring and other activities in connection with the various energy conservation programs for schools, hospitals, units of local government and public care institutions. The funds available for this purpose, while limited by this regulation to 5 percent of the amounts actually awarded in a given State in a particular year, would draw upon the entire amount appropriated for energy conservation projects in the case of schools and hospitals, and the entire sum appropriated for technical assistance programs in the case of units of local government and public care institutions. A limit on grants for State administrative expenses appears consistent with sections 398(a), 398(d) and 400F(d) of the Act. A 5 percent grant ceiling on such expenses is believed reasonable and generally consistent with administrative expense limitations of other Federal grant programs.

This proposed regulation is designed to assure consistency with related State programs so as to maximize the energy conservation goals of NECPA. It is anticipated that the grant programs established by DOE under the new Part 455 will effectively encourage the implementation of programs and measures which will promote energy conservation in facilities owned by schools, hospitals, public care institutions and units of local government in accordance with the Congressional purpose as stated in NECPA.

II. Technical Assistance Programs

For these grant programs to realize their full potential, it is important that all no-cost and low-cost energy saving operating and maintenance procedures be undertaken as early as possible. Therefore, to be eligible for technical assistance program grants, all institutions must have instituted cost-effective energy conservation operation and maintenance procedures identified as a result of an energy audit. Operations and maintenance procedures are actions which require no significant investment in equipment or materials and which clearly reduce the energy use of the building, with no adverse effect on the quality or amount of services provided. They include procedures such as adjusting thermostats, improving furnace maintencnce or reducing air-change rates. Under these proposed regulations, a "cost-effective" procedure is an action which can be reasonably expected to result in energy cost-savings which exceed the costs, such as increased labor requirements associated with implementing the procedure. A significant portion of the energy savings potential of a facility can be realized through the implementation of sound operations and maintenance procedures.

For purposes of this regulation, the term "technical assistance" means a program or activity for (1) the conduct of specialized studies to identify and specify energy savings and related cost savings that are likely to be realized as a result of either modifying operation and maintenance procedures in a building, or acquiring and installing one or more energy conservation measures in a building, or both and (2) the planning or administration of such specialized studies. In addition, for States, schools and hospitals, which are eligible to receive grants to carry out energy conservation measures, the term "technical assistance" also means the planning or administration of specific remodeling, renovation, repair, replacement, or insulation projects related to the installation of energy conservation measures in a building.

A technical assistance program will include a detailed engineering analysis of a building to determine its cost-effective potential for conserving energy and using solar or other alternative energy resources. Under this proposed regulation such an audit will be conducted only by a "technical assistance auditor" qualified as such in accordance with applicable State standards or criteria. At a minimum, a technical assistance auditor must have experience in energy conservation matters and be a registered professional engineer, or an architect-engineer team. Grants for a technical assistance program will be available for buildings owned by units of local government, public care institutions, schools and hospitals.

Technical assistance auditors will not be permitted to have significant financial interests in the building for which technical assistance is to be performed, nor in the materials and equipment that are expected to be used. The individual(s) performing technical assistance audits will be required to provide to the grantee institution a statement certifying (1) as to the absence of any significant financial interest in the program and (2) as to their qualifications under State standards and DOE regulations to serve as a technical assistance auditor.

III. Energy Conservation Measures

The grant program for schools and hospitals will offer financial assistance for the acquisition and installation of energy conservation measures after the completion of a technical assistance program, or its equivalent. The measures listed and defined in § 455.42 of the proposed regulation are not all-inclusive. Measures recommended by technical assistance auditors, but not listed in this regulation, may still be eligible for funding if shown to have the potential for saving a substantial amount of energy. Support for detailed designs, specifications and installation plans for the energy conservation measures proposed for funding will also be provided.

Although it appears that energy conservation measures have applicability to all regions of the Nation, the practicality of using a particular measure will be determined by calculation of the simple payback of that measure. DOE proposes that energy conservation measures having a simple payback period greater than 15 years will not be eligible for grants under this program. This limitation has been selected to permit consideration of a wide range of available technologies, while precluding the expenditure of limited funding to analyze very high cost energy conservation measures

having a long payback period. DOE solicits comments regarding the 15-year simple payback period limitation.

IV. Allocation of Funds

From the funds appropriated for use in each grant program cycle DOE will offer financial assistance to conduct technical assistance programs and acquire and install energy conservation measures. NECPA requires that DOE allocate funds among the States on the basis of such factors as population, climate, fuel availability and fuel cost. The formula developed by DOE to allocate funds among the States presently contains population, climate and fuel cost factors. DOE solicits comments on methods for acquiring fuel availability data and on the feasibility of utilizing a fuel availability factor in the allocation formula. At such time as reliable fuel availability data is acquired, DOE may modify the allocation formula for subsequent grant program cycles.

Initially, funds will be allocated among the States on the basis of a three-part formula. Eighty-three percent of the funds appropriated for each fiscal year will be allocated on the basis of population and climate (heating and cooling degree days) factors. Seven percent of the funds will be allocated on an equal share basis. The latter percentage is utilized to insure that no State, not including the territories or the District of Columbia, is allocated less than 0.5 percent of the total amount available in any grant program cycle, as required by NECPA. Ten percent of the amounts appropriated will be allocated based upon a forecast of the average cost per million Btu's of energy consumed within a national region. Population figures for each State and the District of Columbia are based upon 1976 Bureau of Census estimates. Population figures for the territories were taken from the 1973 Bureau of Census estimates, the latest available for those areas. Population totals for both States and territories are set forth in Table 1. Fuel costs are based upon DOE projections to 1985 as published in the Administrator's Annual Report 1978, Energy Information Administration, and are set forth in Table 2. Climate information is taken from the National Oceanic and Atmospheric Administration State heating and cooling degree tables, reflecting the annual average by State for 30 years, 1941 through 1970. Table 3 presents this data.

Combining these factors as indicated by the proposed formula produces a State allocation factor as shown in Table 4.

[6450-01-C]

TABLE 1

STATE	POPULATION (IN THOUSANDS)	STATE SHARE OF NATIONAL POP.
ALABAMA	3665	0.0168
ALASKA	382	0.0018
ARIZONA	2270	0.0104
ARKANSAS	2109	0.0097
CALIFORNIA	21520	0.0988
COLORADO	2583	0.0119
CONNECTICUT	3117	0.0143
DELAWARE	582	0.0027
DIST. OF COL.	702	0.0032
FLORIDA	8421	0.0387
GEORGIA	4970	0.0228
HAWAII	887	0.0041
IDAHO	831	0.0038
ILLINOIS	11229	0.0516
INDIANA	5302	0.0243
IOWA	2870	0.0132
KANSAS	2310	0.0106
KENTUCKY	3428	0.0157
LOUISIANA	3841	0.0176
MAINE	1070	0.0049
MARYLAND	4144	0.0190
MASSACHUSETTS	5809	0.0267
MICHIGAN	9104	0.0418
MINNESOTA	3965	0.0182
MISSISSIPPI	2354	0.0108
MISSOURI	4778	0.0219
MONTANA	753	0.0035
NEBRASKA	1553	0.0071
NEVADA	610	0.0028
NEW HAMPSHIRE	822	0.0038
NEW JERSEY	7336	0.0337
NEW MEXICO	1168	0.0054
NEW YORK	18084	0.0830
NORTH CAROLINA	5469	0.0251
NORTH DAKOTA	643	0.0030
OHIO	10690	0.0491
OKLAHOMA	2766	0.0127
OREGON	2329	0.0107
PENNSYLVANNIA	11862	0.0545
RHODE ISLAND	927	0.0043
SOUTH CAROLINA	2848	0.0131
SOUTH DAKOTA	686	0.0031
TENNESSEE	4214	0.0193
TEXAS	12487	0.0573
UTAH	1228	0.0056
VERMONT	476	0.0022
VIRGINIA	5032	0.0231
WASHINGTON	3612	0.0166
WEST VIRGINIA	1821	0.0084
WISCONSIN	4609	0.0212
WYOMING	390	0.0018
AMERICAN SAMOA	28	0.0001
GUAM	100	0.0005
PUERTO RICO	2951	0.0135
VIRGIN ISLANDS	83	0.0004
::		
U.S. TOTAL	217820	1.0000

TABLE 2

OIL IMPORT PRICE: 15.32

DEMAND REGION AVERAGE RETAIL PRICE SUMMARY IN 1978 $/MILLION BTUS

SECTOR(FUEL)	DEMAND REGIONS NW-ENG.	NY/NJ	MID-ATL	S.-ATL	MIDWEST	S.-WEST	CENTRAL	N-CNTRL	WEST	N.-WEST	TOTAL
RESIDENTIAL	5.11	5.66	6.14	7.97	4.56	5.20	4.41	4.10	5.59	4.82	5.39
(ELECT.)	13.31	15.91	13.89	11.05	12.00	11.87	12.70	9.65	12.66	5.63	11.71
(DIST.)	3.89	3.97	4.16	4.23	3.79	3.90	3.69	3.87	3.85	3.85	3.93
(LG)	3.90	4.01	4.32	4.32	3.99	3.92	3.91	4.07	3.94	3.94	4.04
(COAL)	2.07	1.95	1.84	1.97	1.75	1.63	1.68	1.37	1.75	1.76	1.82
(NG)	4.53	4.13	3.58	3.15	3.11	2.39	2.11	2.26	3.35	3.65	3.09
COMMERCIAL	4.78	6.45	6.45	6.65	5.15	6.02	6.05	5.26	6.85	4.22	5.85
(ELECT.)	13.22	17.69	13.31	11.18	11.98	11.26	12.43	8.80	11.71	5.81	12.01
(DIST.)	3.64	3.71	3.76	3.76	3.60	3.64	3.51	3.64	3.56	3.56	3.66
(RESID.)	2.87	2.96	3.27	2.90	3.12	2.97	3.10	3.01	2.92	2.85	2.99
(LG)	3.27	3.27	3.27	3.27	3.49	3.27	3.46	3.47	3.27	3.27	3.38
(COAL)	2.07	1.95	1.84	1.97	1.75	1.63	1.68	1.37	1.75	1.76	1.82
(ASPHALT)	3.18	3.18	3.18	3.17	3.20	3.13	3.15	3.19	3.07	3.07	3.15
(NG)	3.86	3.53	3.11	2.63	2.78	2.46	3.46	3.13	2.83	3.05	2.94
RAW MATERIAL*	3.43	3.35	3.18	2.92	3.25	3.27	3.28	3.20	3.08	2.92	3.22
(LG)	3.61	3.61	3.61	3.58	3.59	3.54	3.52	3.56	3.44	3.44	3.54
(OIL)	3.18	3.18	3.18	3.17	3.20	3.13	3.15	3.19	3.07	3.07	3.15
(NG)	3.29	2.83	2.69	2.19	2.44	2.16	3.10	2.65	2.44	2.37	2.33
INDUSTRIAL***	4.86	4.54	3.92	4.98	3.88	2.98	4.79	3.16	3.85	3.28	3.79
(ELECT.)	10.97	9.47	10.97	9.40	9.37	9.57	10.55	7.30	9.96	3.86	9.29
(DIST.)	3.64	3.69	3.86	3.85	3.60	3.63	3.50	3.66	3.56	3.56	3.67
(RESID.)	2.92	3.06	3.19	2.87	3.10	2.96	3.07	2.96	2.92	2.97	2.99
(LG)	3.66	3.74	3.95	3.96	3.82	3.70	3.76	3.85	3.69	3.69	3.79
(COAL)	2.07	1.95	1.84	1.97	1.75	1.63	1.68	1.37	1.75	1.76	1.76
(MET COAL**)	2.18	2.08	1.97	2.10	2.02	2.12	1.95	2.21	2.59	2.70	2.03
(NAPHTHA)	3.61	3.61	3.61	3.58	3.59	3.54	3.52	3.56	3.44	3.44	3.56
(NG)	3.29	2.83	2.69	2.24	2.44	2.16	3.10	2.65	2.44	2.37	2.31
TRANSPORTATION	5.74	5.79	5.67	5.63	5.67	5.22	5.52	5.49	5.38	5.42	5.55
(ELECT.)	12.44	14.25	12.35	10.33	10.61	10.64	11.74	8.59	11.37	4.96	13.22
(DIST.)	4.79	4.84	5.00	4.99	4.75	4.77	4.65	4.82	4.71	4.71	4.82
(RESID.)	2.92	3.06	3.19	2.87	3.10	2.96	3.07	2.96	2.92	2.97	2.99
(LG)	3.27	3.27	3.27	3.27	3.49	3.27	3.46	3.47	3.27	3.27	3.31
(GASOLINE)	6.05	6.27	6.03	5.94	5.96	5.73	5.83	5.87	6.01	6.02	5.96
(JET FUEL)	4.12	4.23	4.49	4.54	4.05	4.16	3.93	4.16	4.10	4.10	4.22
AVERAGE PRICE	5.16	5.62	5.08	5.76	4.67	3.83	5.01	4.40	5.11	4.42	4.82

*LIQUID GAS IN THE RAW MATERIAL SECTOR INCLUDES LIQUID GAS FEEDSTOCK.
**MET COAL INCLUDES 70% PREMIUM COAL AND 30% BITUMINOUS LOW SULFUR COAL.
***INDUSTRIAL SECTOR HERE DOES NOT INCLUDE REFINERIES.

TABLE 3

STATE	HEATING DEGREE DAYS	COOLING DEGREE DAYS	STATE SHARE HDD + CDD
ALABAMA	2695	1999	0.0134
ALASKA	12012	8	0.0344
ARIZONA	2298	2624	0.0141
ARKANSAS	3214	1892	0.0146
CALIFORNIA	2728	669	0.0097
COLORADO	7004	336	0.0210
CONNECTICUT	6130	507	0.0190
DELAWARE	4780	1021	0.0166
DIST. OF COL.	4750	1015	0.0165
FLORIDA	704	3368	0.0117
GEORGIA	2684	1859	0.0130
HAWAII	1	3528	0.0101
IDAHO	6917	415	0.0210
ILLINOIS	6058	950	0.0201
INDIANA	5713	952	0.0191
IOWA	6834	876	0.0221
KANSAS	4900	1543	0.0184
KENTUCKY	4414	1254	0.0162
LOUISIANA	1701	2636	0.0124
MAINE	8002	222	0.0235
MARYLAND	4782	1015	0.0166
MASSACHUSETTS	6232	467	0.0192
MICHIGAN	6739	593	0.0210
MINNESOTA	8729	473	0.0263
MISSISSIPPI	2411	2223	0.0133
MISSOURI	5024	1332	0.0182
MONTANA	8292	239	0.0244
NEBRASKA	6347	1099	0.0213
NEVADA	4370	1500	0.0168
NEW HAMPSHIRE	7535	297	0.0224
NEW JERSEY	5470	877	0.0182
NEW MEXICO	4766	972	0.0164
NEW YORK	5899	677	0.0188
NORTH CAROLINA	3392	1454	0.0139
NORTH DAKOTA	9484	421	0.0284
OHIO	5779	797	0.0188
OKLAHOMA	3508	2003	0.0158
OREGON	5254	193	0.0156
PENNSYLVANNIA	5755	723	0.0185
RHODE ISLAND	5924	445	0.0182
SOUTH CAROLINA	2697	1885	0.0131
SOUTH DAKOTA	7681	801	0.0243
TENNESSEE	3801	1458	0.0151
TEXAS	2015	2669	0.0134
UTAH	6580	630	0.0206
VERMONT	7873	293	0.0234
VIRGINIA	4286	1113	0.0155
WASHINGTON	5752	171	0.0170
WEST VIRGINIA	5108	849	0.0171
WISCONSIN	7531	541	0.0231
WYOMING	7895	326	0.0235
AMERICAN SAMOA	1	5325	0.0152
GUAM	1	5520	0.0158
PUERTO RICO	704	4907	0.0161
VIRGIN ISLANDS	704	5427	0.0176
::			
U.S. TOTAL	271860	77389	0.9655

TABLE 4

STATE	.07*1/N+.1*SF/NF+.83*SPC/NPC=			ALLOCATION FACTOR
ALABAMA	.0013	.0021	.0112	.0146
ALASKA	.0013	.0016	.0030	.0059
ARIZONA	.0013	.0019	.0073	.0104
ARKANSAS	.0013	.0014	.0070	.0097
CALIFORNIA	.0013	.0019	.0475	.0507
COLORADO	.0013	.0016	.0123	.0152
CONNECTICUT	.0013	.0019	.0134	.0166
DELAWARE	.0013	.0019	.0022	.0053
DIST. OF COL.	.0013	.0019	.0026	.0058
FLORIDA	.0013	.0021	.0223	.0257
GEORGIA	.0013	.0021	.0147	.0181
HAWAII	.0013	.0019	.0020	.0052
IDAHO	.0013	.0016	.0040	.0069
ILLINOIS	.0013	.0017	.0511	.0541
INDIANA	.0013	.0017	.0230	.0260
IOWA	.0013	.0018	.0144	.0175
KANSAS	.0013	.0018	.0097	.0128
KENTUCKY	.0013	.0021	.0126	.0160
LOUISIANA	.0013	.0014	.0108	.0135
MAINE	.0013	.0019	.0057	.0089
MARYLAND	.0013	.0019	.0156	.0188
MASSACHUSETTS	.0013	.0019	.0253	.0285
MICHIGAN	.0013	.0017	.0434	.0464
MINNESOTA	.0013	.0017	.0237	.0267
MISSISSIPPI	.0013	.0021	.0071	.0105
MISSOURI	.0013	.0018	.0197	.0228
MONTANA	.0013	.0016	.0042	.0071
NEBRASKA	.0013	.0018	.0075	.0106
NEVADA	.0013	.0019	.0023	.0055
NEW HAMPSHIRE	.0013	.0019	.0042	.0074
NEW JERSEY	.0013	.0021	.0303	.0336
NEW MEXICO	.0013	.0014	.0044	.0070
NEW YORK	.0013	.0021	.0773	.0806
NORTH CAROLINA	.0013	.0021	.0172	.0206
NORTH DAKOTA	.0013	.0016	.0041	.0070
OHIO	.0013	.0017	.0457	.0487
OKLAHOMA	.0013	.0014	.0099	.0126
OREGON	.0013	.0016	.0082	.0111
PENNSYLVANNIA	.0013	.0019	.0499	.0531
RHODE ISLAND	.0013	.0019	.0038	.0070
SOUTH CAROLINA	.0013	.0021	.0085	.0119
SOUTH DAKOTA	.0013	.0016	.0038	.0067
TENNESSEE	.0013	.0021	.0144	.0178
TEXAS	.0013	.0014	.0380	.0407
UTAH	.0013	.0016	.0058	.0086
VERMONT	.0013	.0019	.0025	.0057
VIRGINIA	.0013	.0019	.0177	.0208
WASHINGTON	.0013	.0016	.0139	.0168
WEST VIRGINIA	.0013	.0019	.0070	.0102
WISCONSIN	.0013	.0017	.0242	.0272
WYOMING	.0013	.0016	.0021	.0050
AMERICAN SAMOA	.0013	.0019	.0001	.0032
GUAM	.0013	.0019	.0004	.0035
PUERTO RICO	.0013	.0021	.0108	.0141
VIRGIN ISLANDS	.0013	.0021	.0003	.0037
::				
U.S. TOTAL	.0700	.1000	.8300	1.0000

NECPA requires that, except for schools and hospitals in a class of severe hardship, The Federal share of the costs for any program or measure may not exceed 50 percent and the remainder of the costs of any technical assistance program or energy conservation measure must be provided from non-Federal sources. DOE proposes that in-kind contributions may be considered as part or all of the non-Federal share. In-kind contributions are subject to the limitations established in Subpart E of the proposed regulation and must be directly related to the program or measure to be approved. The inclusion of a school or hospital in the severe hardship category for up to 90 percent funding of a program or measure will be determined, among other factors, by the applicant's inability to match the 50 percent Federal share, by climatalogical conditions and by fuel costs or availability. DOE solicits comments on the criteria to be used in determining which schools and hospitals are in a class of severe hardship and the method for determining the maximum Federal share for any institution in a class of severe hardship.

Appropriations for support of this grant program will be made to DOE annually, one appropriation for programs and measures for schools and hospitals, another appropriation for technical assistant programs for units of local government and public care institutions. Separate allocations, using the formula described above, will be made to each State for each appropriation. DOE will inform each State of all allocation (and reallocation) actions.

Once a grant is made to a State or institution thereof, DOE anticipates that the funds will be obligated and expended in accordance with milestones established in the grant application. In the event a State does not forward a sufficient number of grant applications to DOE to award all funds allocated for use within that State in a given grant program cycle, DOE will reallocate such funds among all the States for the succeeding grant program cycle.

V. State Plans

A State Plan is the planning document for organizing and managing technical assistance programs and energy conservation measures within the State for the duration of the entire grant program. States participating in the program will be responsible for preparing and implementing a DOE approved State Plan. A State's review, ranking and recommendation to DOE regarding applications received from prospective grantees will also be governed by the State Plan.

Each State will be responsible for direct oversight, monitoring and financial auditing of the programs and measures for which grants are awarded in that State to ensure compliance with program requirements. States will be responsible for notifying DOE promptly of any indication of noncompliance or misuse of grant funds. State Plans shall contain a description of the policies and procedures the State proposes to use in order to fulfill these responsibilities.

Basic data gathered about buildings as a result of the preliminary energy audits should be summarized in the State Plan, and estimates should also be made of possible energy savings, energy conservation needs and the number and types of buildings that may qualify for further financial assistance.

Key elements in the State Plan are the criteria and the procedures to be used in evaluating and ranking applications for financial assistance. Each State may establish in its State Plan any requirements, additional to those set forth in this regulation, which it considers necessary for planning and administering technical assistance programs and energy conservation measures in the State. States should, however, avoid placing undue administrative burdens on any applicants. State Plans must assure that equitable consideration is given to all eligible institutions.

The views of eligible institutions or Statewide organizations representing such institutions, or both, should be solicited and considered during the development of the State Plan. State Plans should also be reviewed by State school facilities agencies and State hospital facilities agencies, where such exist within a given State.

Until a State Plan, approved by DOE, for a given State is in effect, no financial assistance for technical assistance programs or energy conservation measures will be made available to institutions within that State.

State Plans must also set forth the extent to which, and by which methods, the State will encourage utilization of solar space heating, cooling and electric systems and solar water heating systems.

DOE recognizes that some States and municipalities have retained some regulations or building codes which may have the effect of impeding the introduction of energy-saving devices and equipment, particularly in the case of solar energy systems. Therefore, early review of applicable State regulations and local codes is encouraged to identify any restrictions on or barriers to achievement of energy conservation goals which must be taken into account in formulating and implementing State Plans.

VI. Applications

Applications for technical assistance program grants and energy conservation measures grants will be forwarded by the applicant to the State for its review, evaluation and ranking in priority according to criteria contained in the State Plan. Applicants must include all of the information required by Subpart E of the proposed regulation and any additional information required by the State. Applications which are consistent with the State Plan and applicable regulations should, at the time specified by DOE, be transmitted by the State to DOE for final approval and grant award. State applications for grants, including grants to defray administrative expenses, should be transmitted to DOE at the same time. Comments are requested concerning the scope and clarity of the requirements set forth in Subpart E of the proposed regulation and the ability of applicants to comply with those provisions.

VII. State Evaluation and Ranking of Applications

States will be responsible for reviewing and evaluating each application received for consistency with the State Plan, this regulation, and other applicable State, local and Federal laws and regulations. As an additional means for assuring that the programs and measures proposed for funding are coordinated with other State and Federal programs, as required by NECPA, States must forward applications received from schools and hospitals to the applicable State school facilities agency or State hospital facilities agency for review and certification as to compliance with State programs for educational facilities and State health plans.

States shall rank each building for which funding applications have been submitted. Such ranking must be based upon the energy conservation potential of the building as determined through an energy audit. States must also give preference to those applicants that have completed an energy audit without the use of Federal funds. States shall be responsible for developing any further specific ranking procedures and criteria for inclusion in a State Plan.

Simple payback periods will be the main criteria used to rank buildings covered by grant applications for energy conservation measures. Lifecycle costing, discounted payback and simple payback methodologies were considered for use as criteria for ranking applications. The simple payback methodology was chosen because it offers an opportunity to standardize payback calculations and thereby ease administration, and because it directly reflects the energy cost savings accru-

ing from an energy conservation measure.

For applications for financial assistance to implement energy conservation measures, Subpart F of the proposed regulation specifies the criteria which will be evaluated by the State. Each State will assign a specific weight, as justified by the conditions within the State, to each criterion set forth in the regulation and listed in order of descending priority. Thus, the projected payback period criterion must be given the greatest weight, conversion to renewable energy sources the next greatest weight, etc.

VIII. Program Reports.

It is important that the energy and cost savings achieved by participating institutions through this grants program be documented, not only to allow better monitoring of the operation of the grants program, but also to demonstrate what has been accomplished by the various energy conservation programs for schools, hospitals, units of local government and public care institutions. To this end, DOE proposes that each grantee submit an interim report to the State semi-annually until the program or measure is completed. This interim report should summarize progress and accomplishments, problems encountered, and other relevant information. Each State in turn will submit a semi-annual report to DOE summarizing the information received from the grantees. At the end of the program or measure, each grantee will also submit a final technical report to the State describing the work accomplished and the results achieved. A summary of that technical report must be forwarded to DOE simultaneously with the transmittal of the basic report to the State.

IX. Grant Awards

Under Title III of NECPA, DOE may make grants of up to 50 percent of the cost of a technical assistance program to States, schools, hospitals, public care institutions and units of local governments, and up to 50 percent of the cost of an energy conservation measure to States, schools and hospitals.

As part of any grant award for technical assistance or energy conservation measures, DOE may concurrently grant up to 5 percent of the total of all grants made to institutions in a given State in a grant program cycle directly to that State to help defray its expenses of administration. The award of such grants on a cost-sharing basis should assure sufficient funds to the State to carry out its planning and administrative responsibilities under the program.

The total of all grant awards to schools and hospitals for funding technical assistance programs may not exceed 30 percent of the amounts appropriated to DOE for energy conservation project grants (pursuant to section 397(b) of the Act for the fiscal year ending September 30, 1978; 15 percent of such appropriations for the fiscal year ending September 30, 1979; and 5 percent of such appropriations for the fiscal year ending September 30, 1980.

X. Reporting Requirements

U.S. Government standard forms for grant-in-aid programs will be used insofar as possible. If there are any exceptions to this policy, they will be examined and justified element by element. At this time, the only modifications to the standard reporting requirements are to be included in the "Remarks" section of Standard Form 424. The proposed items are:

1. Certification of applicant eligibility,
2. Specific building identification,
3. Energy use and savings data,
4. Statement regarding implementation of cost-effective recommendations,
5. Detailed schedule of project activities,
6. Reports of other prerequisite actions taken in conjunction with this program,
7. Assurances regarding potential conflicts of interest,
8. Statements regarding the qualifications of technical assistance auditors, and
9. Statements regarding compliance with provisions of the Davis-Bacon Act and other Federal, State and local laws and regulations.

XI. Nondiscrimination

DOE has published a proposed rulemaking in the Federal Register entitled, "Nondiscrimination in Federally Assisted Programs", 43 FR 53658 *et. seq.*, November 16, 1978. Where applicable, grantees will be responsible for compliance with the provisions of that rulemaking upon publication of that final rulemaking.

XII. Comment Procedures

(1) WRITTEN COMMENTS

Interested persons are invited to submit written comments with respect to the proposed regulation to the Office of State Specific Programs, Department of Energy, Room 6456, 12th and Pennsylvania Ave., NW., Washington, D.C. 20461. Comments should be identified on the outside of the envelope and on the document with the designation "TA/ECP". Fifteen (15) copies should be submitted. All comments received will be available for public inspection in the DOE Reading Room, Room GA-152, Forrestal Building, 1000 Independence Avenue, SW, Washington, D.C., between the hours of 8:00 a.m. and 4:30 p.m., e.s.t., Monday through Friday. All comments and related information must be received by January 28, 1979, before 4:30 p.m., e.s.t., in order to insure consideration.

Any information or data considered by the person furnishing it to be confidential must be so identified and submitted in writing, one copy only. Any material not accompanied by a statement of confidentiality will not be treated as confidential. DOE reserves the right to determine the confidential status of the information or data and to treat it according to its determination.

(2) PUBLIC HEARINGS

DOE has determined that, in addition to the hearing in Washington, D.C., it will hold hearings in Chicago, Illinois and Seattle, Washington to receive oral presentations from interested persons.

The Washington, D.C. hearing will be held at 9:30 a.m., e.s.t., on January 23, 24, and 25, 1979, Room 3000A, 12th and Pennsylvania Ave., N.W., Washington, D.C.

Any person who has an interest in the proposed regulation or who is a representative of a group or class of persons which has an interest in it may make a written request for an opportunity to make an oral presentation. Such a request should be directed to Margaret Sibley, Office of State Specific Programs, Department of Energy, Room 6456, 12th and Pennsylvania Avenue, N.W., Washington, D.C. 20461, and must be submitted on or before January 17, 1979, by 4:30 p.m., e.s.t. The person making the request should describe his or her interest in the proceeding and provide a concise summary of the proposed oral presentation and a phone number where he or she may be reached. Each person who, in DOE's judgment, proposes to present relevant material and information shall be selected to be heard and shall be notified by DOE of his or her participation before 4:30 p.m., e.s.t., January 19, 1979, and shall submit 15 copies of their proposed statement to Margaret Sibley, Office of State Specific Programs, Department of Energy, Room 6456, 12th and Pennsylvania Avenue, N.W., Washington, D.C. 20461 by 9 a.m., e.s.t., January 23, 1979.

The hearings in Chicago, Illinois and Seattle, Washington will be held beginning at 9:30 a.m., local time, on the dates and at the locations specified below.

Any person who has an interest in this proceeding or is the representative of a group or class of persons which has an interest in it may make a written request for an opportunity to

make an oral presentation. Such a request should be directed to DOE, at the address given below for the appropriate city and must be received before 4:30 p.m., local time on January 17, 1979. Procedures for notification shall be the same as in the case of the Washington, D.C. hearing.

DOE also received comments and assistance from its Regional Offices.

In accordance with DOE's obligation under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, DOE is undertaking an environmental assessment of all programs under Title III of the NECPA.

City	Hearing date	Submit requests to testify to—	Hearing location
Seattle, WA	Jan. 22, 1979 through Jan. 24, 1979.	Gilbert Haselberger, DOE, 1923 Federal Building, Seattle, WA 98174.	Hilton Hotel Downtown, 6th and University, Seattle, WA
Chicago, IL	Jan. 22, 1979 through Jan. 24, 1979.	Ken Johnson, DOE, 175 W. Jackson, Third Floor, Chicago, IL 60604.	Pick Congress Hotel, 520 South Michigan Ave., Chicago, IL

C. CONDUCT OF HEARINGS

DOE reserves the right to arrange the schedule of presentations to be heard and to establish the procedures governing the conduct of the hearing. The length of each presentation may be limited, based on the number of persons requesting to be heard.

A DOE official will be designated as presiding officer to chair the hearing. Questions may be asked only by those conducting the hearing, and there will be no cross-examination of persons presenting statements.

Any participant who wishes to ask a question at the hearing may submit the question, in writing, to the presiding officer. The presiding officer will determine whether the question is relevant and material, and whether the time limitations permit it to be presented for answer.

Any further procedural rules needed for the proper conduct of the hearing will be announced by the presiding officer.

A transcript of the hearing will be made and the entire record of the hearing, including the transcript, will be retained by DOE and made available for inspection at the DOE Freedom of Information Reading Room, Room GA 152, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585, between the hours of 8:00 a.m. and 4:30 p.m., e.s.t., Monday through Friday. Any person may purchase a copy of the transcript from the reporter.

XIII. CONSULTATION WITH OTHER FEDERAL AGENCIES, ENVIRONMENTAL AND URBAN REVIEWS AND REGULATORY ANALYSIS

In preparing this proposed regulation, issues and options were reviewed by representatives of the Secretary of the Department of Health, Education, and Welfare, and the Administrator of the Environmental Protection Agency. This assessment and any additional NEPA review will be completed prior to the promulgation of the final rulemaking. NECPA also requires DOE to issue a final rule for these grant programs within a specified period after enactment. DOE seeks to afford members of the public at least 30 days to comment on this notice of proposed rulemaking. Consequently, DOE is unable to complete an environmental assessment to accompany this notice of proposed rulemaking.

This proposed regulation has been reviewed in accordance with Executive Order 12044, 43 FR 12661, and DOE's proposed directive implementing the Order published at 43 FR 18634 and, pursuant thereto, it has been determined to be a "significant regulation" likely to have a "major impact". A regulatory analysis is being prepared by DOE and will be made available to the public before issuance of a final regulation. Notwithstanding the determination that this proposed regulation is significant, which would usually require a 60 day comment period, the Deputy Secretary has approved a shorter comment period so that, consonant with the requirements of NEPCA, the final rule may be issued at the earliest practicable date.

This proposed regulation has also been reviewed in accordance with OMB Circular A-116 to assess the impacts on urban centers and communities. DOE has determined that the proposed regulation is a major policy and program initiative which requires formal urban and community impact analysis. Such analysis is being prepared by DOE for incorporation into the regulatory analysis required under Executive Order 12044.

DOE has been advised by the Office of Management and Budget (OMB) that this program is exempted from the requirements of OMB Circular A-95.

As required by section 7(c)(2) of the Federal Energy Administration Act of 1974, Pub. L. 93-275, a copy of this notice has been submitted to the Administrator of the Environmental Protection Agency (EPA) for comments concerning the impact of this proposal on the quality of the environment. The Administrator had no comments.

In consideration of the foregoing, the Department of Energy proposes to amend Chapter II, Title 10 of the Code of Federal Regulations by adding new Subparts C through I to Part 455 as set forth below.

Issued in Washington, D.C., December 29, 1978.

OMI WALDEN,
Assistant Secretary, Conservation and Solar Applications, Department of Energy.

10 CFR Part 455 is amended by establishing new Subparts C, D, E, F, G, H and I as follows:

TABLE OF CONTENTS

Subpart I—Allocation of Appropriations Among the States

AUTHORITY: Parts 1 and 2 of Title III of the National Energy Conservation Policy Act, Pub. L. 95-619, 92 Stat. 3206 *et seq.*, which establishes Parts G and H, respectively, of Title III of the Energy Policy and Conservation Act, Pub. L. 94-163, 42 U.S.C. 6321 *et seq.*; Section 365(e)(2), 42 U.S.C. 6325 (e)(2), of the Energy Conservation and Production Act, Pub. L. 94-385, 42 U.S.C. 6801 *et seq.*; Department of Energy Organization Act, Pub. L. 95091, 42 U.S.C. 7101 *et seq.*; Federal Grant and Cooperative Agreement Act of 1977, Pub. L. 95-224, 41 U.S.C. 501 *et seq.*; E.O. 12009, 42 FR 46267; E.O. 12044, 43 FR 12661.

Subpart C—Technical Assistance Programs for Schools, Hospitals, Units of Local Government and Public Care Institutions

§ 455.40 Purpose and scope.

This subpart sets forth the contents of technical assistance programs that may receive financial assistance under this part and determines the eligibility of States, as well as schools, hospitals, units of local government and public care institutions located in States that have an approved State Plan to receive grants for technical assistance to be performed in buildings owned by such institutions.

§ 455.41 Eligibility.

To be eligible to receive financial assistance for a technical assistance program, an applicant must——

(a) Be a State, school, hospital, unit of local government or public care institution as defined in § 455.2;

(b) Be a State having, or be located in a State which has, an approved State Plan as described in Subpart H of this part;

(c) Subsequent to the most recent construction, configuration or utilization change to the building, have conducted an energy audit or its equivalent, as determined by the State, for the building or buildings for which financial assistance is to be requested;

(d) Assure that it has implemented all cost-effective operations and maintenance procedures which are identified as a result of the energy audit;

(e) Have no plan or intention at the time of application to close such building or buildings for which financial assistance is to be requested within the simple payback period of any measure proposed for the building; and

(f) Submit an application in accordance with the provisions of this part and the approved State Plan.

§ 455.42 Contents of program.

(a) A technical assistance program shall include a detailed engineering analysis of a building by a technical assistance auditor to identify energy and cost savings likely to be realized as a result of implementing all cost-effective operation and maintenance procedures (in addition to those identified in an energy audit) and also, one or more energy conservation measures, including measures for conversion to solar or other alternative renewable energy sources.

(b) At the conclusion of a technical assistance program, the technical assistance auditor shall prepare a final report which shall include—

(1) A description of building characteristics and energy data including—

(i) Name and address of the building and its owner;

(ii) Weather and climate data including building orientation, shading, solar radiation, etc.;

(iii) Function of and use patterns for the building frequency and normal occurrence of energy consumption peaks;

(iv) Mechanical details for the heating, ventilation and air conditioning (HVAC) systems;

(v) Operating characteristics of other energy using systems, such as domestic hot water, lighting, and control systems;

(vi) Age and remaining useful life of the building; and

(vii) Any other relevant information developed during an energy audit of the building;

(2) An analysis of the estimated energy consumption of the building, in Btu's, at peak efficiency (assuming implementation of all cost-effective operations and maintenance procedures);

(3) An analysis of the building's potential for solar conversion, particularly for water heating systems;

(4) A description and analysis of all recommendations, if any, for acquisition and installation of energy conservation measures (including potential solar conversion) setting forth—

(i) A description of each recommended energy conservation measure;

(ii) An estimate of the cost of each such energy conservation measure;

(iii) An estimate of the energy cost savings expected from acquisition and installation of each energy conservation measure. In calculating the potential energy cost savings of each energy conservation measure, technical assistance auditors shall—

(A) Assume that all energy savings obtained from cost-effective operation and maintenance procedures identified by an energy audit or by the technical assistance program have been realized; and

(B) Calculate the total energy and energy cost savings expected to result from the acquisition and installation of all recommended energy conservation measures, taking into account the interaction among the various measures; and

(C) Calculate that portion of the total energy and energy cost savings as determined in (B) above, attributable to each individual energy conservation measure;

(iv) The simple payback period of each such energy conservation measure. The simple payback period is calculated by dividing the estimated cost of the measure by the estimated annual cost saving accruing from the measure. For the purposes of ranking applications, the simple payback period must be calculated using the cost saving resulting from energy savings only. Other economic analyses, such as life cycle costing, which consider all costs and cost savings, such as maintenance costs and/or savings, resulting from an energy conservation measure, may be provided as additional information for use by the institution in its decision-making process.

Subpart D—Energy Conservation Measures for Schools and Hospitals

§ 455.50 Purpose and scope.

This subpart specifies what constitutes an energy conservation measure that may receive financial assistance under this part and sets forth the eligibility criteria for States, schools and hospitals located in States, which have an approved State Plan, to receive grants for energy conservation measures, including measures for conversion to solar, other renewable sources, or alternative energy resources.

§ 455.51 Eligibility.

(a) To be eligible to receive financial assistance for an energy conservation measure, an applicant must—

(1) Be a State, school, or hospital and otherwise meet the requirements contained in § 455.2;

(2) Be a State having, or be located in a State which has, an approved State Plan as described in Subpart H of this part;

(3) Subsequent to the most recent construction, configuration or utilization change to the building, have completed a technical assistance program or its equivalent, as determined by the State, for the building or buildings for which financial assistance is to be requested;

(4) Have implemented all cost-effective operation and maintenance procedures which are identified as the result of an energy audit and a technical assistance program;

(5) Have no plan or intention at the time of application to close such building or buildings for which financial assistance is to be requested within the

simple payback period of any energy conservation measure within each building for which financial assistance is requested; and

(6) Submit an application in accordance with the provisions of this part and the approved State Plan.

(b) To be eligible for financial assistance, the simple payback period of each energy conservation measure for which financial assistance is requested within each building shall not be greater than 15 years.

§ 455.52 Contents of program.

The program to be funded under this Subpart will be energy conservation measures acquired and installed to reduce energy consumption or allow the use of alternative energy sources for schools and hospitals. Such measures may include but not necessarily be limited to—

(a) Insulation for bare pipes, water heaters, hot water storage tanks, chilled water piping, ductwork and other uninsulated mechanical equipment carrying an above or below ambient temperature fluid, which resists heat transfer from the mechanical systems to the surrounding space;

(b) Roof insulation, using new or additional material (applied, sprayed or rigid) which resists heat transfer through the roof;

(c) Ceiling insulation, installed either above or below the ceiling to resist heat transfer through the ceiling;

(d) Wall insulation, using a rigid or sprayed material, installed to resist heat transfer through the wall;

(e) Floor insulation, using a material which resists heat transfer through the floor between the first level heated space and the unheated space beneath it;

(f) Storm windows, which are an additional window, normally installed to the exterior, but which may be installed to the interior of the primary or ordinary window, to increase resistance to heat transfer, and to decrease air infiltration through the window assembly;

(g) Storm doors, which are an extra door installed to the exterior of an exterior door, but also may be installed as part of the entrance vestibule, to decrease heat transfer and air infiltration through the building entrance ways;

(h) Multiglazed window or door systems, which are a single glass unit consisting of multiple layers of glass separated by hermetically sealed air spaces, which provide greater resistance to heat transfer;

(i) Reduction in glass area through use of bricking, insulated paneling, etc., which decreases heat transfer and air infiltration;

(j) Heat absorbing or heat reflective glazed and coated window and door systems, which are specially treated, coated or laminated glazing systems to absorb or reflect solar heat;

(k) Caulking, which is nonrigid material placed in joints of buildings or window or door systems to prevent the passage of air and moisture through the building envelope;

(l) Weatherstripping, which consists of strips of flexible material placed over, under, or in movable joints of windows and doors to reduce the passage of air and moisture;

(m) Automatic energy control systems, such as mixed air temperature reset devices; cooling coil discharge temperature reset devices; hot deck temperature reset devices; economizer controls; enthalpy controls; night setback thermostats; time clocks to start/stop selected HVAC systems, refrigeration equipment, boilers, chillers, hot water generators, plus associated pumps and fans, thermostatic radiator valves, and central computer control systems, which adjust the supply of heating, cooling, and ventilation to meet space conditioning requirements;

(n) Equipment required to operate or convert to variable energy supply, including—

(1) Hydraulic ventilating systems which are adjusted by the automatic energy control systems to turnoff or vary the consumption of energy systems to deliver no more energy than required at any operating point;

(2) Constant volume air distribution systems altered to variable air flow systems by the addition of variable air flow boxes, fan volume control dampers and related climatic controls; or

(3) Water spray coils for adiabatic cooling during optimum weather conditions;

(o) Passive solar systems (those using gravity, heat absorption or reflection, evaporation, etc.) which collect and transfer energy (including south facing windows, trombe walls, and awnings) without the use of mechanical devices;

(p) Solar space heating or cooling systems, which consist of solar collectors, and associated thermal storage, heat exchangers, pumps/fans, controls and piping/ducting;

(q) Solar electric generating systems, which consist of photovoltaic solar collectors and associated electric storage and controls, or concentrating solar collectors and generating equipment, or wind energy conversion systems;

(r) Solar domestic hot water heating systems, which consist of solar collectors, and associated thermal storage, heat exchangers, pumps, controls, and piping for thermal demand, such as domestic hot water, laundry, kitchen, and boiler water makeup;

(s) Furnace or utility plant modifications, which consist of the installation of equipment to achieve reduction in fuel consumption, or to convert to renewable energy sources or coal, including—

(1) Replacement burners, furnaces, boilers, or any combination thereof, which are designed to substantially reduce the amount of fuel consumed as a result of increased combustion efficiency;

(2) Electrical or mechanical furnace ignition systems which eliminate continuous energy use;

(3) Devices for modifying flue openings, such as dampers and heat exchangers, which increase the efficiency of the total heating systems;

(4) Automatic combustion control systems, which improve burner operating performance to reduce consumption of fuel during full and part load operation;

(5) Devices, such as turbulators and flow restrictors, for modifying boiler capacity and hot water units to reduce oversized equipment to a proper size (after the other building modifications), which increase the full and part load efficiency of the primary equipment; and

(6) Equipment required to convert existing oil- and gas-fired boiler installations to alternative energy sources, including coal;

(t) Lighting fixtures modifications and associated rewiring, which reduce the watts per square foot level of illumination through use of such measures as high frequency ballasts, phantom tubes, lamp sources of higher efficiency, improved luminaires, use of non-uniform task/ambient lighting design, while maintaining lighting levels for task perfomance. Lighting fixtures modifications that increase the general illumination level of a facility shall not be eligible for funding unless the increase is necessary to conform to any applicable State or local building code or unless such increase is approved by the Secretary;

(u) Energy recovery systems which reduce energy used in heating and cooling systems by—

(1) Direct recycling of uncontaminated air, which has been conditioned, to an adjacent area for heating, cooling or ventilation makeup;

(2) Exhaust air heat recovery to preheat outside air supply with heat recovery devices such as rotary air wheels, plate heat exchangers, non-regenerative heat-pipe devices, and runaround loop systems; or

(3) Purifying with charcoal or other mediums and recycling exhaust air from toilet areas, dining rooms, and lounges, and other building areas;

(v) Cogeneration systems which produce steam, heat, or other forms of energy as well as electricity for use

primarily within a building or complex of buildings and which meet such fuel efficiency requirements as may be prescribed or approved by DOE and which may be new heat recovery equipment added to existing electrical generation systems;

(w) Any other measures as a grant applicant shows will save a substantial amount of energy or as are identified in an energy audit prescribed pursuant to section 365(e)(2) of the Energy Policy and Conservation Act. Such measures must be specifically identified in any grant application, including a complete description of the measure together with calculations and other technical data supporting the projected cost and energy savings.

Subpart E—Applicant Responsibilities

§ 455.60 Grant application submittals.

(a) Each eligible State, school, hospital, unit of local government and public care institution desiring to receive financial assistance for costs of technical assistance programs, or, in the case of an eligible State, school or hospital, for costs of energy conservation measures, relating to a building of buildings owned by such entity shall file an application in accordance with the provisions of this Subpart and the approved State Plan of the State in which such building is located. The application, which may be amended in accordance with applicable State procedure at any time to the State's final determination thereon, shall be filed with the State energy agency designated in the applicable approved State Plan.

(b) An application for financial assistance for costs of technical assistance programs shall include—

(1) The applicant's name and address;

(2) A written statement certifying that the applicant is eligible under § 455.41;

(3) Identification of each building for which financial assistance is requested, to include information required by 10 CFR in § 455.42(a)(1) through (5);

(4) A statement of current energy use by building (Btu/sq.ft./yr.);

(5) Estimate of energy savings, by building (Btu/sq.ft./yr.), resulting from implementation of operations and maintenance procedures identified in the energy audit;

(6) A project budget, by building, which identifies the sources and amounts of non-Federal funds, including in-kind contributions (limited to the goods and services described in OMB Circular A-102, "Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments", which are directly related to the project and do not include funds derived from revenue sharing or other Federal sources), to be used to meet the costsharing requirements described in Subpart G; and

(7) A brief description, by building, of the proposed technical assistance program, scheduling and milestone dates for achieving the overall technical assistance program objective and associated estimated costs;

(8) Schedules and milestone dates for the conduct and completion of technical assistance programs for each building.

(c) Applications from a State, school or hospital for financial assistance for costs of energy conservation measures shall include—

(1) The applicant's name and address;

(2) A written statement certifying that the applicant is eligible under § 455.51;

(3) Identification of each building for which financial assistance is requested, to include information required by 10 CFR 450.42(a) (1) through (5);

(4) A written statement that cost effective operation and maintenance procedures identified as a result of a technical assistance program have been implemented in each building by the applicant;

(5) A project budget, by building, which shall include identification of the sources and amounts of non-Federal funds to be used to meet the costsharing requirements described in Subpart G of this part;

(6) A statement of the applicant's ability to provide required matching non-Federal funds, including in-kind contributions (limited to the goods and services described in OMB Circular A-102, "Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments", which are directly related to the project and do not include funds derived from revenue sharing or other Federal sources), and the proposed sources and method of financing;

(7) Schedules and milestone dates for the completion of the acquisition and installation of energy conservation measures for each building;

(8) A listing, by building, of the specific energy conservation measures proposed for funding, indicating the cost of each measure, the estimated energy saving of each measure, the projected simple payback period for each measure, computed in accordance with the methodology described in § 455.42(b)(4) (iii) and (iv), and the average simple payback period of all measures proposed for the building. The average simple payback period shall be determined by dividing the total cost of all measures proposed by the total projected saving (from energy savings only) accruing from all measures proposed;

(9) A technical assistance program report for each building, the program for which was conducted subsequent to the most recent construction, configuration or utilization change to the building;

(10) If the application covers any of the measures set forth in § 455.52 (p), (q), (r), (s), (u), and (v) above, sufficient data for DOE to evaluate the environmental impacts of those measures. For any other measure set forth in § 455.52 if the applicant is aware of any adverse impacts which may arise from the adoption of such measures, the applicant shall provide an analysis of such impacts with the application.

(d) Financial assistance for units of local government and public care institutions will be provided only for buildings which are owned and primarily occupied by offices or agencies of a unit of local government or public care institution and which are not intended for seasonal use and not utilized primarily as a school or hospital.

(e) Financial assistance provided to a school which is a local education agency as defined in § 455.2 must not be used for acquisition or installation of any energy conservation measure in any building of such agency which is used principally for administration, or technical assistance in connection with any such undertaking for such a building.

(f) Financial assistance will not be provided for technical assistance programs or energy conservation measures commenced prior to November 9, 1978.

§ 455.61 Applicant certifications.

(a) Applications for financial assistance for technical assistance programs and energy conservation measures shall include a signed statement that the applicant—

(1) Has satisfied the requirements set forth in § 455.60;

(2) Will expend granted funds for the purposes stated in the application and in compliance with the requirements of this Part and the applicable approved State Plan;

(3) Has implemented all cost-effective operation and maintenance procedures recommended as a result of the energy audit and, for applications for energy conservation measures, those recommended in the report obtained under a technical assistance program;

(4) Will obtain from the technical assistance auditor, before the auditor performs any work in connection with a technical assistance program or energy conservation measure, a signed statement certifying that the technical assistance auditor has no conflicting financial interests and is otherwise qualified to perform the duties of a technical assistance auditor in accordance with the standards and criteria

established in the approved State Plan; and

(5) Will not enter into any contract relating to an energy conservation measure (except technical assistance), which requires or may require expenditure of more than $5,000 (excluding technical assistance costs), that does not conform to the provisions of the Davis-Bacon Act (40 U.S.C. 276a to 276a-5) pertaining to minimum wages for construction in the applicant's locality.

§ 455.62 Grant applications for State administrative expenses.

(a) Each State desiring to receive a grant for State administrative expenses shall file an application therefor in accordance with the provisions of this section. The application shall be submitted to DOE at the time the State forwards approved grant applications for technical assistance programs and energy conservation measures.

(b) Applications for financial assistance for State administrative expenses shall include—

(1) The name and address of the person designated by the State to be responsible for the State's functions under this Part;

(2) A projected itemized budget for State administrative expenses listed in § 455.83(b) and limited thereunder;

(3) A statement of the State's ability to provide required matching non-Federal funds, including in-kind contributions (limited to the goods and services described in OMB Circular A-102 which are directly related to the project and do not include funds derived from revenue sharing or other Federal sources), and the proposed method of financing.

§ 455.63 Grantee records and reports.

(a) Each State, school, hospital, unit of local government and public care institution which receives a grant for technical assistance programs, energy conservation measures or State administrative expenses shall keep all the records required by § 455.4.

(b) In January and June of each year each grantee shall, until the grantee's program has been concluded, submit a report to the State which shall detail and discuss—

(1) Activities accomplished, those not accomplished, status of in-progress activities, problems encountered, and remedial actions, if any, planned;

(2) Cost-effective operation and maintenance procedures and energy conservation measures studied, recommended, or installed, with accompanying projected or actual costs, energy and cost savings, payback periods and specifying any material variances from those projected in the original applications; and

(3) Financial status reports completed in accordance with OMB circulars listed in § 455.3. Financial status reports must be submitted simultaneously to both the State and DOE.

(c) Within 90 days following conclusion of a technical assistance program or completion of an energy conservation measure by a grantee, the grantee shall submit a final report to the State and a summary thereof to DOE which shall detail and discuss, as applicable—

(1) A summary of all work accomplished;

(2) Problems encountered and recommended solutions;

(3) Results achieved under the program;

(4) Final financial reports completed in accordance with OMB circulars listed in § 455.3;

(5) For a completed technical assistance program—

(i) A complete inventory and description of major energy-using equipment and systems;

(ii) Calculated energy consumption for the building (assuming the implementation of all cost-effective operations and maintenance procedures);

(iii) Differences between the calculated energy consumption and the actual energy consumption of the building;

(iv) Recommended changes in operation and maintenance procedures indicating the energy and cost savings anticipated;

(v) Recommended energy conservation measures indicating the energy cost savings anticipated, and the cost of acquiring and installing the measures (with simple payback periods) in order of ascending payback period, that is, ranked in order with the lowest payback first; and

(vi) A recommended implementation plan, grouped into categories of energy saving operation and maintenance procedures, and energy conservation measures. Energy conservation measures will be presented in order of ascending payback period;

(6) For completed energy conservation measures, (1) through (4) above, and

(i) A complete inventory and description of major energy-using equipment and systems;

(ii) A complete inventory and description of modifications to and construction and installation of major energy-using equipment and systems;

(iii) A final projected simple payback period, computed in accordance with § 455.42(b)(4)(iv), for each building specifying and utilizing the actual costs for each measure and all the measures, taken as a whole; and

(iv) Certification by the technical assistance auditor that the modifications (material, equipment and installation) made conform in all respects to the report on the technical assistance program and the approved application.

Subpart F—State Responsibilities

§ 455.70 State evaluation of grant applications.

(a) Each application received by a State shall be reviewed and evaluated to determine whether it complies with Subparts C, D and E of this part, any additional requirements of the approved State Plan State environmental laws, and other applicable laws and regulations.

(b) The State will forward each application for a school or hospital to the State school facilities agency or the State hospital facilities agency, as the case may be, for review and certification that such application is consistent with related State programs for educational facilities, and State health plans under sections 1524(c)(2) and 1603 of the Public Health Service Act, and has been coordinated through the review mechanisms under section 1523 of the Public Health Service Act and section 1122 of the Social Security Act. No application from a school or hospital shall be approved until such certification has been issued.

§ 455.71 State ranking of grant applications.

(a) All applications received by the State will be ranked by the State on an individual building by building basis. In the case of energy conservation measures, a complex may be ranked as a single building if the application proposes a single energy conservation measure which directly involves all of the buildings in the complex. States shall rank buildings in descending priority, based upon the following factors—

(1) The average simple payback period of all energy conservation measures proposed for the building;

(2) The type(s) of energy source to which conversion is proposed (with weighting adjustments directly proportional to the ratio of the cost of the conversion measure to the total cost of all measures proposed for a given building, including in descending priority)—

(i) Renewable;

(ii) Coal;

(iii) Electricity (as primary, baseload fuel)—

(A) Nuclear fired;

(B) Coal fired;

(3) The type(s) of primary energy to be saved (with weighting adjustments directly proportional to the ratio of the cost of the energy saving measure to the total cost of the energy saving measure to the total cost of all measures proposed for a given building), including in descending priority—

(i) Natural gas;

(ii) Oil;
(iii) Electricity (as primary, base-load fuel)—
(A) Natural gas fired;
(B) Oil fired;
(C) Coal fired;
(D) Nuclear fired;
(4) Remaining useful life of building;
(5) Climate within the State;
(6) Fuel prices or fuel availability within the State;
(7) Other factors as determined by the State.

(b) Each State shall develop separate groupings for ranking all buildings covered by applications, in compliance with the State Plan, for—
(1) Technical assistance programs for units of local government and public care institutions;
(2) Technical assistance programs for schools and hospitals; and
(3) Energy conservation measures for schools and hospitals.

(c) Within each grouping, a State shall set forth the ranking of each building, the amount of financial assistance requested for each such building. A State shall also indicate which of the buildings in the ranking are approved by the State for financial assistance, and which of those approved, the State recommends for funding, within the limits of the State's allocations.

(d) Within each grouping of ranked of buildings, a State shall assure that—
(1) Schools receive not more than 70 percent of the total funds allocated for schools and hospitals to the State in the grant program cycle for schools and hospitals;
(2) Hospitals receive not more than 70 percent of the total funds allocated for schools and hospitals to the State in the grant program cycle for schools and hospitals; and
(3) School and hospital applicants for Federal funding in excess of 50 percent on the basis of severe hardship under § 455.71 receive in the aggregate no more than 10 percent of the funds allocated to the State in the grant program cycle for schools and hospitals.

(e) To the extent provided in § 455.82 (c), additional financial assistance with be available for schools and hospitals experiencing severe hardship as determined in accordance with this part, and funding therefor will be taken from the funds reserved for grants up to 90 percent of the total costs of the technical assistance program and/or energy conservation measures.

(f) Applications for Federal funding in excess of 50 percent based on claims of severe hardships shall be given an additional evaluation and ranking, and identified within groupings of building rankings. The amount of the proposed Federal share in excess of 50 percent for each building shall be specified within each grouping, and the sum of the all the grants in excess of the 50 percent requested for buildings covered by severe hardship grant applications shall be provided separately.

(g) The criteria for the evaluation and ranking of severe hardship applications are list below in the descending order in which weights for each factor are to be applied by the State—
(1) Inability to provide the 50 percent non-Federal program costs;
(2) Fule costs and availability which differ significantly from the average within the State; and
(3) Climatological conditions which differ significantly from the average conditions within the State.

(h) In determining the maximum Federal share for an institution in a given locality that is in a class of severe hardship, States shall use the U.S. Department of Commerce publication, *Qualified Areas Under the Public Works and Economic Development Act of 1965, as amended.* Institutions in those locations listed in the publication may be eligible for Federal funding for this program at the "Maximum Grant Rate" assigned to that location in such publication, plus 10 percent.

§ 455.72 Forwarding of applications.

Each State shall, once each grant program cycle, within the period specified by DOE and published in the FEDERAL REGISTER, forward to DOE those applications that the State recommends for financial assistance, ranked pursuant to the provisions of § 455.71.

§ 455.73 State Duties.

(a) Each State shall be responsible for—
(1) Notifying each applicant, within 60 days following receipt by the State of the application or the last amendment thereof whether its application has been approved and recomended for funding;
(2) Direct program oversight, monitoring and financial auditing of the activities for which grants are awarded to its institutions to insure compliance with all legal requirements. States shall immediately notify the Secretary of any non-compliance or indication thereof.

(b) Each State shall submit a report to DOE—
(1) By the close of the sixth month following State Plan approval by DOE, and in each March thereafter for the duration of the grant program, describing generally—
(i) The operations of the program;
(ii) Problems encountered and recommended solutions;
(iii) Program related financial expenditures by the grantees and the State;
(2) By the close of the twelfth month following State Plan approval by DOE and in each August thereafter for the duration of the grant program, giving—
(i) A narrative on the program, including objectives accomplished, problems encountered and recommended solutions;
(ii) A detailed report on program related financial expenditures by all grantees and by the State; and
(iii) A summary of the most recent reports received by the State pursuant to § 455.63.

Subpart G—Grant Awards

§ 455.80 Approval of grant applications

(a) The Secretary shall review and approve applications submitted by a State in accordance with § 455.72 and in accordance with the State's ranking of buildings contained in such applications if the Secretary determines that the applications meet the objectives of the Act, and comply with the applicable State Plan and the requirements of this Part. The Secretary may disapprove all or any portion of an application to the extent that funds are not available to carry out a program or project (or portions thereof) contained in the application, or for such other reasons as the Secretary may deem appropriate.

(b) The Secretary shall notify a State and the applicant of the final approval or disapproval of an application at the earliest practicable date after the Secretary's receipt of the application, and, in the event of disapproval, shall include a statement of the reasons therefor. An application which has been disapproved may be amended and resubmitted within the same grant program cycle with the consent of the Secretary.

(c) The Secretary may also, after reasonable notice and hearing, terminate financial assistance under a previously approved application if the Secretary determines the applicant has failed to comply substantially with the terms and conditions set forth in the application and this subpart.

§ 455.81 Grant Awards For Units Of Local Government and Public Care Institutions.

(a) The Secretary may make grants to States, units of local governments and public care institutions of up to 50 percent of the costs of performing technical assistance programs for buildings covered by an application approved in accordance with § 455.80.

(b) Total grant awards within any State to units of local government and public care institutions are limited to

the funds allocated to each State in accordance with Subpart I of this part.

(c) No grant awarded under this section for a technical assistance program shall include funding for the purchase of an item of equipment having an acquisition cost in excess of $500.

§ 455.82 Grant Awards For Schools and Hospitals.

(a) The Secretary may make grants to States, schools and hospitals of up to 50 percent of the costs of performing technical assistance programs for buildings covered by an application approved in accordance with § 455.80, subject to the following—

(1) Total grant awards within any State to schools and hospitals are limited to the funds allocated to each State in accordance with Subpart I of this part;

(2) Grant awards for technical assistance programs in any State within any grant program cycle shall not exceed—

(i) 30 percent of the amount allocated to a given State from the 1978 fiscal year appropriation for technical assistance programs and energy conservation measures for schools and hospitals;

(ii) 15 percent of the amount allocated to a given State from the 1979 fiscal year appropriation for technical assistance programs and energy conservation measures for schools and hospitals; or

(iii) 5 percent of the 1980 fiscal year appropriation for technical assistance programs and energy conservation measures for schools and hospitals.

(b) The Secretary may make grants to States, schools and hospitals of up to 50 percent of the costs of acquiring and installing energy conservation measures for buildings covered by an application approved in accordance with § 455.80. Total grant awards within any State are limited to the funds allocated to each State in accordance with Subpart I of this part.

(c) The Secretary may award up to 10 percent of the total amount allocated to a State for technical assistance programs and energy conservation measures, in a given grant program cycle, to cover more than 50 percent but not to exceed 90 percent of the cost of a technical assistance program or an energy conservation measure for applicants in a class of severe hardship, as ascertained in accordance with the State Plan.

(d) The Secretary shall not award more than 70 percent of the total amount allocated to a State for technical assistance programs and energy conservation measures in a given grant program cycle to either schools or hospitals in that State.

(e) No grant awarded under this section for a technical assistance program shall include funding for the purchase of an item of equipment having an acquisition cost in excess of $500.

§ 455.83 Grant Awards For State Administrative Expenses.

(a) Concurrently with grant awards for approved applications for institutions in a given State, the Secretary may make a grant to that State in an amount not exceeding 5 percent of the total amount of such awards for the purpose of defraying State expenses in the administration of technical assistance programs and energy conservation measures within that State. Grants for such purposes may be made for up to 50 percent of a State's projected administrative expenses, as approved by the Secretary.

(b) A State's administrative expenses shall be limited to those directly related to administration of technical assistance programs and energy conservation measures, including costs associated with—

(i) Personnel, whose time is expended directly in support of such administration;

(ii) Supplies, expended directly in support of such administration;

(iii) Equipment purchased or acquired solely for, and utilized directly in support of such administration, provided that no items of equipment costing more than $200 shall be acquired without the express consent of DOE;

(iv) Printing, directly in support of such administration; and

(v) Travel, directly related to such administration.

Subpart H—State Plan Development and Approval

§ 455.90 Contents of State Plan.

Each State shall develop a State plan for technical assistance programs and energy conservation measures. The State Plan shall be reviewed and approved by the Governor of the State or the State energy agency and shall include—

(a) A statement setting forth the procedures by which the views of eligible institutions or State-wide organizations representing such institutions, or both, were solicited and considered during development of the State Plan;

(b) A description of the preliminary energy audit results (described in Subpart B of this part) which have been conducted in the Sate including, but not limited to—

(1) In the case of a State which has completed preliminary energy audits of all potentially eligible buildings, a summary of the data gathered pursuant to § 450.42 for all such buildings;

(2) In the case of a State which has completed preliminary energy audits of a sample of all potentially eligible buildings within the State—

(i) Reasonably accurate estimates of the preliminary energy audit data required by § 450.42 for all potentially eligible buildings within the State; and

(ii) A plan which describes further actions to be taken in order to obtain the required information for all potentially eligible buildings;

(3) Estimates of the energy savings, by class of building, expected to result from modification of maintenance and operating procedures and installation of energy conservation measures in such buildings;

(4) Recommendations as to the number and estimated cost of technical assistance programs and types and estimated costs of energy conservation measures for each grant program cycle;

(c) A description of the policies and procedures to be used by the State for evaluating grant applications;

(d) A description of the policies and procedures that the State will follow to insure that funds will be allocated equitably among eligible applicants within the State, including procedures to insure that funds will not be allocated on the basis of size or type of institution but rather on the basis of relative need taking into account such factors as cost, energy consumption and energy savings. Such policies and procedures shall be in accordance with § 455.71;

(e) A description of the policies and procedures that the States will follow in the identification, ranking and allocation of funds to severe hardship applicants which are eligible to receive financial assistance in excess of the otherwise applicable 50 percent limit. Such policies and procedures shall be in accordance with § 455.71(g);

(f) A Statement setting forth the extent to which, and by which methods, the State will encourage utilization of solar space heating, cooling and electric systems and solar water heating systems;

(g) A description of the policies and procedures to assure that all financial assistance under this part will be expended in compliance with the requirements of the State Plan, in compliance with the requirements of this part, and in coordination with all other State and Federal energy conservation programs;

(h) A description of the policies and procedures to insure implementation of cost-effective energy conserving maintenance and operating procedures in those buildings for which financial assistance is awarded under this part;

(i) A description of the policies and procedures designed to insure that financial assistance under this part will be used to supplement, and not to supplant, State, local or other funds;

(j) A description of the policies and procedures for establishment of, and

adherence to, milestones for accomplishment of technical assistance programs and energy conservation measures receiving financial assistance under this part;

(k) A description of the policies and procedures for State management, financial audit and evaluation of technical assistance programs and energy conservation measures receiving financial assistance under this part;

(l) A description of the program of the State for establishing and insuring compliance with qualifications for technical assistance auditors. Such policies shall require at a minimum that a technical assistance auditor have experience in energy conservation and be a registered professional engineer licensed under the regulatory authority of the State, or be an architect-engineer team the members of which are licensed under the regulatory authority of the State, and that a technical assistance auditor be free from financial interests which may conflict with the proper performance of his or her duties;

(m) A description of the policies and procedures for apportionment of funds among eligible institutions within the State. As a minimum such policies and procedures shall assure a separate priority ranking for each building pursuant to the provisions of § 455.71 covered by an application approved pursuant to the provisions of § 455.70 for—

(1) Technical assistance programs for units of local government and public care institutions;

(2) Technical assistance programs for schools and hospitals; and

(3) Energy conservation measures for schools and hospitals.

§ 455.91 Submission and Approval of State Plans.

(a) Proposed State Plans shall be submitted to the Secretary within 90 days of the effective date of this Subpart unless the Secretary, upon request and for good cause shown, grants an extension of time.

(b) The Secretary shall, within 60 days of receipt of a proposed State Plan, review each Plan and, if it is found to conform to the requirements of this part, approve the State Plan. If the Secretary does not disapprove a State Plan within the 60-day period, the Secretary will be deemed to have approved the State Plan.

(c) If the Secretary determines that a proposed State Plans fails to comply with the requirments of this part, the Secretary shall return the Plan to the State with a statement setting forth the reasons for disapproval. With the consent of the Secretary, the State may submit a new or amended Plan at any time.

§ 455.92 State Plans Developed by the Secretary.

(a) If a State Plan has not been approved by February 7, 1981, or within 90 days after completion of the preliminary energy audits, whichever is later, the Secretary may develop and implement a State Plan on behalf of the schools and hospitals in the State.

(b) Subsequent to the development of a State Plan by the Secretary, the State may submit its own State Plan and the Secretary shall approve or disapprove such plan within 60 days after receipt by the Secretary. If the proposed plan meets the requirements of this part, and is not inconsistent with any plan developed and implemented by the Secretary, the Secretary shall approve the State Plan which shall automatically replace the Plan developed by the Secretary.

Supbart I—Allocation of Appropriations Among the States.

§ 455.100 Allocation of Funds.

The Secretary will allocate available funds for the purpose of awarding grants to States, schools, hospitals, units of local government and public care institutions to implement grant programs for schools and hospitals and buildings owned by local government and public care institutions in accordance with this subpart.

§ 455.101 Allocation Formulas.

(a) Financial assistance for conducting technical assistance programs for units of local government and public care institutions shall be allocated among the States by multiplying the sum available by the allocation factor set forth in paragraph (c) of this section.

(b) Financial assistance for conducting technical assistance programs and acquring and installing energy conservation measures for schools and hospitals shall be allocated among the States by multiplying the sum available by the allocation factor set forth in paragraph (c) of this section.

(c) The allocation factor (K) shall be determined by the formula—

$$K = \frac{0.07}{n} + 0.1\left(\frac{Sfc}{Nfc}\right) + 0.83\left(\frac{(SP)}{(NP)}\frac{(SC)}{(NC)}\right)$$

where, as determined by DOE—

(1) S_{fc} is the average retail cost per million Btu's of energy consumed within the region in which the State is located, as reflected in the 1985, Series C projections contained in DOE's Energy Information Administration Administrator's Annual Report, 1978;

(2) N_{fc} is the national average retail cost per million Btu's of energy consumed, as reflected in the 1985, Series C projections contained in DOE's Energy Information Administration Administrator's Annual Report 1978;

(3) n is the total number of eligible States;

(4) SP is the population of the State, as determined from 1976 census estimates, "Current Population Reports", Series P-25, number 603;

(5) NP is 217,820,000, the total population of all eligible States;

(6) SC is the sum of the State's heating and cooling degree days, as determined from National Oceanic and Atmospheric Administration data for the thirty year period, 1941 through 1970;

(7) NC is 349,249, the sum of all eligible States' heating and cooling degree days.

(d) Except for the District of Columbia, Puerto Rico, Guam, American Samoa and the Virgin Islands, no allocation available to any State may be less than 0.5 percent nor more than 10 percent of the total amount appropriated.

(e) Ten percent of each State's allocation each year for schools and hospitals shall be apportioned by the State for additional financial assistance, in excess of the 50 percent Federal share, up to 90 percent of the costs of technical assistance programs and energy conservation measures for those schools and hospitals determined to be in a class of severe hardship. Such determinations shall be made in accordance with § 455.71(g).

(f) By notice published in the FEDERAL REGISTER, the Secretary shall notify each State of the total amount allocated for grants within the State for any grant program cycle. For purposes of this regulation, grant "program cycle" is a period of time to be specified by DOE, which is related to the fiscal year for which grant funds are appropriated during which one complete cycle of grant activity occurs, including DOE allocation of appropriations to the States, application review and approval, and grant award.

(g) By notice published in the FEDERAL REGISTER, the Secretary will notify each State of the period for which funds allocated for a grant program cycle will be reserved for grants within the State.

§ 455.102 Reallocation of Funds.

(a) If a State Plan has not been approved and implemented by any State by the close of the period for which allocated funds are available as set forth in the notice(s) issued by the Secretary pursuant to § 455.101(g) funds allocated to that State for technical assistance and energy conservation measures will be reallocated among all States for the next grant program cycle, if applicable.

(b) If a State Plan has not been approved by February 7, 1981, or within ninety days after completion of the preliminary energy audits, whichever is later, the Secretary may develop and implement a State Plan on behalf of the schools and hospitals within the State. If the Secretary does not develop a State Plan for a State, the funds reserved for that grant program cycle for schools and hospitals in that State will be reallocated for the next grant program cycle among all States for schools and hospitals.

(c) If a State does not forward a sufficient number of grant applications, which are approved by the Secretary, to award all the funds allocated for the State in that grant program cycle, the Secretary shall reallocate the remaining funds among all States for the next grant program cycle.

(d) If a State does not forward a sufficient number of grant applications, which are approved by the Secretary under the severe hardship provisions set forth in § 455.71(g), to award all of the funds allocated to the State for that purpose in that grant program cycle, the Secretary shall reallocate the remaining hardship funds among all States for the next grant program cycle.

§ 455.103 Reallocation of Preliminary Energy Audit/Energy Audit Funds.

(a) If a State has utilized Federal assistance to cover in excess of 50 percent of the costs for conducting preliminary energy audits and energy audits, the amount of such excess over 50 percent shall be subtracted from that State's allocation for technical assistance and energy conservation projects and reallocated among all other States for the next grant program cycle according to the formula set forth in § 455.101.

(b) To the extent that funds allocated to a State for preliminary energy audits and energy audits are not needed because all potentially eligible buildings have had an energy audit or its equivalent conducted, such funds may be made available for technical assistance or energy conservation measures. DOE shall, upon request by the State, redistribute funds not needed for preliminary energy audits and energy audits to the State allocation for technical assistance or energy conservation measures, as appropriate and such funds shall be in addition to those which would otherwise be available for such purposes.

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